STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No.: 02-0153-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

JOSEPH JILES,
Defendant-Appellant-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ROBERT CRAWFORD PRESIDING.

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

ISSUES PRESENTED FOR REVIEW

Whether a Trial Court may conduct an evidentiary Fifth Amendment Suppression Motion hearing without requiring the State to present any live testimonial evidence, such as that of the interrogating police officer, in order for it to meet its burden

of proof? Defendant's trial attorney failed to object to the trial court's permitting the State to prove an evidentiary Fifth Amendment Suppression Motion hearing without any live testimony, contrary to United States Supreme Court law, as well as applicable Wisconsin case law. Furthermore, the trial court found that the State had met its burden of proof with respect to this Suppression Motion hearing without any live testimony and without any properly authenticated supporting police report.

Defendant was charged with one Count of Attempted First Degree Intentional Homicide - While Armed, and one Count of Armed Robbery. The State charged both Counts as Party to a Crime. Defendant, and co-Defendant Lyron Terrell Wilson, were alleged to have grabbed the car keys of Evelyn Payton at a gas station. There was a struggle. One of the individuals grabbed the keys. During this struggle, one of the individuals shot her. This was in Milwaukee County Case No. 00 CF 2479.

Defendant filed a Motion to Suppress Defendant's custodial statement, pursuant to the Fifth Amendment. The Motion sought to suppress his custodial statement on multiple grounds. First, Defendant indicated that the interrogating officers failed to provide him with the required Miranda warnings. Second, he asserted that he was intoxicated during the taking of the statement. Finally, he asserted that the interrogating officers were overbearing. By the last two grounds, Defendant asserted that the statement was involuntary.

The trial court conducted an evidentiary hearing on

Defendant's Motion to Suppress his custodial statement. The trial court allowed the State to present its evidence, and meet its burden of proof, solely on the basis of a police report. The trial court did not require any live testimony, even though Defendant was, among other issues, attacking the overbearing conduct of the police officers. No police officer was subject to cross-examination. The police report was not authenticated as part of the State's case. The State did not even offer this report. After the submission of this report, the trial court found that the State had met its required burden of proof. The trial court found that this burden of proof had been met, both with respect to the providing and waiver of Miranda warnings, as well as voluntariness. Subsequent to this finding, the Defendant then testified on his own behalf. After these proceedings, the trial court denied Defendant's Motion.

The trial court erred in not ruling that the evidentiary Fifth Amendment Suppression Motion hearing in this case was defective. The Court of Appeals erred in affirming this ruling. True, the Rules of Evidence do not apply to preliminary questions of the admissibility of evidence. However, both the United States Supreme Court as well as Wisconsin case law have ruled that live testimony is required at Fifth Amendment confession Suppression hearings. Furthermore, the need for authentication of documents is not a formal rule of evidence. Instead, such authentication is required even if the Rules of Evidence do not apply. Accordingly, the trial court's procedure in conducting the evidentiary Motion

hearing was contrary to both U.S. Supreme Court, and Wisconsin, law. The law cited by the Court of Appeals is inapplicable to the present situation. Furthermore, any law cited by the Court of Appeals was misapplied to the present situation.

Clearly, the applicable law indicates that live testimony that meets the rigors of cross-examination is required at Fifth Amendment Suppression hearings. Furthermore, any hearsay document(s) must be authenticated at such hearings. Clearly, the Wisconsin Rules of Evidence do not abrogate such requirements. There is no provision of Wisconsin case law that allows the Rules of Evidence to replace such requirements. Furthermore, the Rules of Evidence, even as presently written, do not replace these requirements. For example, the Rules of Evidence do not state, to the effect, "...by these Rules, live testimony is not required at Fifth Amendment Suppression Motion hearings." However, there are threshhold procedural requirements which do not contradict the Wisconsin Rules of Evidence that the trial court did not follow in this case. One such requirement is live testimony.

The Court of Appeals Decision in this matter has created new boundaries as to how little evidence needs to be present at a Fifth Amendment Suppression Motion hearing. These boundaries are in conflict with existing case law, and are erroneous and illegal. Furthermore, there does not need to be a finding that the Wisconsin Rules of Evidence are unconstitutional. (This Brief reproduces this Decision in the attached Appendix at A101-110).

STATEMENT OF THE CASE

Mr. Jiles was charged in a two Count Criminal Complaint dated May 18, 2000. He was charged with one count of Attempted First Degree Intentional Homicide - While Armed, and one Count of Armed Robbery, both as Party to a Crime. The charges allege that Defendant, along with co-defendant Lyron Terrell Wilson, approached Evelyn Payton while she was at a gas station. She had stopped at the gas station while on her way home from work. She went into the gas station to buy some lottery tickets. She was getting back into her car when two black males ran at her. They tried to grab her purse, but were unable to do so. They then tried to grab her car keys, she struggled with them, and one of the suspects got her car keys. During this struggle, one of the suspects shot her. This occurred in Milwaukee County. (1:1-4).

During custodial interrogation, Defendant allegedly gave a voluntary custodial statement to Detective Ronald Burch on May 16, 2000. Defendant indicated that he and "Ready Rell" (Co-Defendant Wilson) were at a bus stop near a gas station. They had been riding on a bus that evening. He stated that the two of them then saw an old lady get out of a car and go into the gas station. The two agreed to rob the old lady. When she walked out of the gas station, the two grabbed her. Defendant allegedly stated that the victim did not have a purse, but did have a key chain with a sack on it. He grabbed the key chain from her because he thought that the sack was where she kept her money. He

then stated that he ran with the key chain and heard a gunshot. He saw Wilson running behind him. They were then stopped by a black male in a uniform. He indicated that he did not know that Wilson had a gun and did not see Wilson shoot the victim, but heard the gunshot come from where Wilson and the victim were. This was alleged to have occurred on May 15, 2000, in the City of Milwaukee. The Criminal Complaint stated this statement. (1:3-4).

Subsequent to the preliminary hearing, Defendant's attorney, Darryl Kastenson, prepared and filed a Notice of Motion and Motion to Suppress Evidence (henceforth "Motion to Suppress" or "Motion"). This Motion was filed on September 22, 2000. The Motion sought to suppress Defendant's custodial statement on the grounds that Defendant was not properly Mirandized prior to giving his statement, and the statements were not voluntarily made due to his own intoxication as well as the overbearing conduct by the interrogating officers. The Motion sought suppression of the statement on the basis that the statement violated Defendant's Constitutional rights under both the U.S. and Wisconsin Constitutions. (13:1-2).

The trial court conducted a hearing on Defendant's Motion to Suppress. This hearing occurred on October 12, 2000. Prior to this hearing, the trial court indicated that case law stated that the State bore the burden of proof. The burden of proof with respect to Miranda warnings, and voluntary waiver of such warnings, was by preponderance of the evidence. The burden of proof of whether the statement was taken voluntarily was beyond a

reasonable doubt. (38:8).

At the October 12, 2000, the trial court indicated that it was not bound by the Rules of Evidence when considering whether a Defendant knowingly and voluntarily waived his Miranda rights and whether his statement was voluntary. (38:9). The trial court considered the police report which was attached to Defendant's Motion to Sever his trial from that of Co-Defendant Wilson. (31:Exhibit 1). The State itself did not offer this report. This report was neither certified nor in affidavit form. The trial court proceeded to recite the police report, but no qualified witness authenticated the police report as part of the State's case in order for it to meet its burden of proof. (38:10).

At no time did Mr. Kastenson object to the consideration of the police report on the basis of lack of authentication. Furthermore, at no time did he object to the entire proceedings as violating either the U.S. or Wisconsin Constitutions, particularily with respect to the Due Process Clause.

During the Motion to Suppress hearing, the trial court indicated that the police report indicated that Defendant was arrested on May 15, 2000 at 11:30 p.m.. At the bottom of page 1, the police wrote that Defendant denied being high on drugs or drunk on alcohol. The report also indicated that Defendant said that he had been counseled on mental health and was prescribed Ritalin when he was nine. The report also indicated that Defendant was questioned. Questioning began approximately four-and-one-half hours after arrest, and that Detective Ronald Burch

advised Defendant of his Miranda rights. The report recited that Defendant stated that he understood all of his rights, that the report indicated that he waived his rights and made a statement. (38:10-11). The trial court never indicated that the police reports recited the specific Miranda warnings. The police reports do not identify the specific warnings. (31:Exhibit 1).

On October 12, 2000, the trial court further indicated that following the Miranda warnings recitation of information, there was an "X" placed on the report, and apparently Joseph Jiles signed his name. The report then proceeds to allegedly indicate Defendant's involvement. After this indication, the report has a place for Defendant to sign his name, and the trial court concluded, without authentication, that Defendant did sign his name. The report further indicated that the interrogation lasted approximately one hour and 22 minutes. (38:11).

The trial court then concluded, after this recitation of the unauthenticated police report, that this information on the police report dealing with the interrogation by police of Defendant met the State's burden of production. The trial court further concluded that these police reports met the State's burden of proof that Defendant received his Miranda warnings, that he waived these warnings knowingly and voluntarily prior to being interrogated, and that the statements were made knowingly and voluntarily. (38:11-12). No witness testified for the State. The State's entire presentation was the police reports, in the form and manner previously indicated. (38:9-12). Subsequent to

this conclusion, the trial court then turned to Defendant to rebut these conclusions. The Defendant then testified on his own behalf.

On October 12, 2000, the Defendant testified that he did not know what Miranda warnings were. (38:13). He testified that prior to his arrest, he had consumed a quarter ounce of marijuana. He shared that with his codefendant. (38:14). He smoked this marijuana about 20 minutes prior to his arrest. He could still feel these effects when he was arrested. It affected his ability to understand what was going on at the time of his arrest. (38:15). When he was brought to the interrogation room, he was still under the effect of the marijuana. He was high on marijuana at that time. He could only understand a little bit of what was happening. All that he can remember is that the police officer was writing and asking him all kinds of crazy questions. (38:18). Prior to this interrogation, Defendant testified that he was never advised of his Miranda rights. Defendant's attorney went through each one of the rights individually. (38:19). Defendant testified that he never read the material in front of his signature prior to signing it. The police officer just told him to sign it. (38:20). He never read the document prior to signing it. He was still feeling the effects of the marijuana at the time. (38:21).

Defendant testified on October 12, 2000 that the person who was doing the questioning was using a loud and demanding voice. (38:31).

During arguments, Mr. Kastenson did argue that the record was uncontroverted that Defendant was not read his rights. All that was present was a piece of paper with assertions on it. There was no testimony under oath, to go to the credibility of the State's case and credibility of the State's officers. Mr. Kastenson did indicate that the police reports did not specify the individual rights and exactly what rights were purportedly read to Defendant. Mr. Kastenson did further discuss Defendant's testimony pertaining to the issue of voluntariness. (38:35-37).

However, at no time during arguments did Mr. Kastenson provide any pertinent case law to support his position. Furthermore, these arguments may or may not be construed as objections to the entire proceedings based upon either Due Process considerations or lack of authentication of the police reports.

The trial court found that the State had met its burden of proof with respect to both the Miranda issues as well as the voluntariness issues. The trial court found that there were facts sufficiently shown at the hearing to support this conclusion. The trial court denied the Motion to Suppress. (38:37-42).

On October 20, 2000, Mr. Jiles entered Guilty pleas to an Amended Count One and the original Count Two. Count One was amended to that of First Degree Reckless Injury While Armed. This was the same amendment as to the Co-Defendant. The second Count remained unchanged. (39:2-5).

On December 8, 2000 the trial court sentenced both

Defendants to twenty years on Count 1, to consist of fifteen years initial confinement and five years extended supervision. As for Count 2, the trial court sentenced both Defendants to twenty years initial confinement and twenty years extended supervision. Count 2 was consecutive to Count 1. (40:50-53).

On December 24, 2001, Mr. Jiles subsequently filed and served a Motion for Post-Conviction Relief requesting an evidentiary hearing to determine trial counsel's potentiaal ineffectiveness (hereinafter "a Machner hearing"). The Motion contained attachments. In this Motion, Mr. Jiles argued that trial counsel was prejudicially ineffective for three reasons. First, trial counsel failed to object to the trial court's improper handling of the Defendant's Miranda-Goodchild hearing. The hearing, as conducted, violated the Due Process Clause of the Constitution. Second, trial counsel failed to object to the trial court's use of the hearsay custodial statement without any authentication and foundation. (31:1-21).

The trial court denied Mr. Jiles' Motion for Post-conviction Relief via Decision and Order dated January 4, 2002 (henceforth "Decision and Order"). (32:1-10). In this Decision and Order, the trial court denied the request to hold a Machner hearing. It indicated that, with respect to the Miranda-Goodchild procedure, the Rules of Evidence did not apply. However, this ignored cited U.S. and Wisconsin Supreme Court case law which mandated a full evidentiary hearing requiring the State to present testimony. Furthermore, the Judicial Comments to the Rules of Evidence refer

to such case law.

With respect to the lack of authentication of police reports, the Decision and Order indicates that this was material exchanged in discovery and therefore bore indicia of reliability. (32:7). However, this is incorrect. Simply because the State provided this material to the Defendant in discovery does not mean that it bears indicia of reliability. It is simply a series of photocopied papers with writing on it. It was not in certified nor in affidavit form. No witness testified as to its authenticity. This does not meet any rational standard of authentication. (23:1-7).

On October 22, 2002, the Court of Appeals denied Defendant's Appeal. The Court indicated that the Wisconsin Rules of Evidence do not apply to Fifth Amendment Motion hearings. (A106-108, Para 13). However, the Court of Appeals did not even consider, nor discuss, the case law that mandates live testimony at such Motion hearings. Defendant's Brief presented such case law. Such case law is both United States Supreme Court case law as well as Wisconsin case law. The Argument below clearly cites, and outlines, this case law as well as its historical development. The argument below discusses the historical development both in Wisconsin as well as before the United States Supreme Court. Accordingly, the Court of Appeals omission of any mention of this case law is harmful prejudicial error. The requirement for live testimony at Fifth Amendment Motion hearings does not arise from a discussion of the Rules of Evidence. It arises from both United

States, and Wisconsin, case law. The Court's Decision omitted any such discussion. It is, therefore, faulty and erroneous.

Also, the Court of Appeals indicated that authentication is not an issue at Fifth Amendment Motion hearings. It reached this conclusion, in part, because it concluded that the Rules of Evidence do not apply at such Motion hearings. (A 108-109, Para 14). However, the Judicial Council Committee Notes to the Rules of Evidence indicate that authentication is not a question of the application of a technical rule of evidence. Accordingly, the Court misapplies the Rules of Evidence to the requirement of authentication. The requirement of authentication is not a Rule of Evidence.

Finally, the Court of Appeals Decision is partially based upon the Defendant's own testimony at the Motion hearing. The Court decided that Defendant's testimony concerning the interrogation session supplied the necessary authentication of the hearsay document(s). (A108-109, Para 14, footnote 8). However, this conclusion is also erroneous. The Defendant is not required to testify at such Motion hearings. Furthermore, the State has the burden of proof at such Motion hearings, regardless of whether or not the Defendant testifies. Based upon the Court of Appeals Decision, a Fifth Amendment Motion hearing would be based upon whether or not a Defendant testifies. This is improper. Furthermore, this is not the present fact situation. Here, the trial court concluded here that the State had met its burden of proof prior to the Defendant's testimony. Accordingly,

the Court's Decision miscites the applicable law requiring the State to provide authenticated documents in order to meet its burden of proof.

Based upon the foregoing, and the Argument cited below, the Court of Appeals' Decision is too narrow, and is an inappropriate interpretation of the law as related to the present facts. It must be reversed.

ARGUMENT

I. THE COURT OF APPEALS DECISION HOLDING THAT THE TRIAL COURT COULD CONDUCT A FIFTH AMENDMENT SUPPRESSION MOTION BASED SOLELY UPON THE POLICE REPORTS WAS ERRONEOUS AND ILLEGAL. CONTRARY TO THIS DECISION, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

A. The Constitutional Standard and procedural requirements

The right to effective assistance of counsel stems from the Sixth Amendment of the United States Constitution and Article I, Section 7, of the Wisconsin Constitution, which guarantee a Defendant a fair trial and effective assistance of counsel. The test for ineffective assistance of counsel is two pronged. First, the Defendant must demonstrate that his trial counsel's performance was deficient; and second, the Defendant must demonstrate that the deficient performance prejudicied him. Strickland vs. Washington, 104 S.Ct. 2052, 466 U.S. 668 (1984); State vs. Sanchez, 201 Wis.2d 219, 227-228, 548 N.W.2d 69 (1996). In order to show prejudice, the Defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. State vs. Sanchez, 201 Wis.2d 219 at 236 citing Strickland vs. Washington, 466 U.S. at 694

Once the Defendant shows prejudicial ineffectiveness of his counsel in his Motion papers, then the trial court must conduct an evidentiary hearing to determine whether or not counsel's representation was deficient and fell below an objective standard of reasonableness. State vs. Machner, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App. 1979); State vs. Curtis, 218 Wis.2d 550, 582 N.W.2d 409 (Ct.App. 1998).

B. The trial court's conducting of the Motion hearing based solely upon the police report was illegal. Such a hearing violates the Due Process Clause of the Constitution. Trial counsel Kastenson was prejudicially ineffective for failing to properly object.

The United States Supreme Court has concluded that with respect to the issue of voluntariness of confessions, Defendants are entitled to fair evidentiary hearing. At this hearing, the both the underlying factual issues and the voluntariness of his confession are to be actually and reliably determined. Jackson vs. Denno, 84 S.Ct. 1774, 378 U.S. 368 (1964). The procedures used in the trial court to arrive at its conclusion on the coercion issue progressively take on added significance in relation to the actual measure of the protection afforded a defendant under the Due Process Clause of the Constitution against the use of involuntary confessions. These procedures must, therefore, be fully adequate to insure a reliable and

clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend. Jackson vs. Denno, 84 S.Ct. 1774 at 1788.

In Jackson vs. Denno, the U.S. Supreme Court discussed the New York procedure of whereby the trial court submitted to the jury along with other issues in the case, for a single verdict, the question as to the voluntariness of the confession. Id. at 1781. The Supreme Court decided that the New York procedure failed to satisfy the requirements of the Due Process Clause of the Constitution. Id. at 1781.

Importantly, for the present situation, the Jackson case discussed in part, what is required for a fair evidentiary hearing. The Supreme Court discussed that expanded concepts of fairness in obtaining confessions deal with the issues of questions of credibility with questions of facts frequently in dispute. Id. at 1788.

The Supreme Court earlier discussed the requirements of a fair evidentiary hearing in Townsend vs. Sain, 83 S.Ct. 745, 372 U.S. 293 (1963). In this case, the Supreme Court discussed the issue of federal habeas corpus evidentiary hearings. The Supreme Court indicated that where facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in state court. A federal evidentiary hearing is required unless the state court trier of fact has after a full hearing

reliably found the relevant facts. Townsend vs. Sain, 83 S.Ct. 745 at 757.

In Townsend, the Supreme Court indicated that a full and fair evidentiary hearing by the District Court requires live testimony. Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. Questions of credibility, of course are basic to resolution of conflicts in testimony. The Supreme Court indicated that for the District Court to merely review the state court record would generally not be sufficient to determine credibility. Id. at 762. Such a paper review does not allow for a proper determination of credibility.

In the present situation, based upon Townsend, the trial court's determination of the credibility of the police officer based solely upon the police report was improper and illegal. One cannot determine credibility based upon paper, just as the U.S. Supreme Court indicated that credibility cannot be based upon a state record. Furthermore, one cannot simply assume that police officers never lie. This is essentially what the trial court concluded.

Interestingly, Townsend vs. Sain dealt with the issue of a State trial court's handling of a hearing on a Defendant's Motion to Suppress a confession on the grounds that it was involuntary. Id. at 748.

The Wisconsin Supreme Court adopted the Jackson vs. Denno standard in 1965. In State ex rel. Goodchild vs. Burke, 27 Wis.2d

244, 133 N.W.2d 753 (1965), the Supreme Court indicated that the Jackson vs. Denno procedure is required to determine voluntariness. The Supreme Court discussed the U.S. Supreme Court's Decision State ex rel. Goodchild in order to render its conclusion. State ex rel. Goodchild vs. Burke, 27 Wis.2d 244 at 259-266.

In State vs. Burnett, 30 Wis.2d 375 (1965), the Wisconsin Supreme Court reemphasized that the Jackson vs. Denno procedure is required to determine voluntariness. The Supreme Court discussed the procedure used by the trial court. The Supreme Court indicated that in deciding whether or not the trial court made the proper decision, the trial court's ability to determine credibility of witnesses by virtue of its opportunity to hear and observe them was crucial. Id. at 381. In this case, the Supreme Court discussed the actual testimony of three State witnesses in deciding that the confession was voluntary. Id. at 381-382.

In Roney vs. State, 44 Wis.2d 522, 171 N.W.2d 400 (1969), the Wisconsin Supreme Court expanded the requirement of a pretrial evidentiary hearing, required for voluntariness, to include determination of Miranda requirements. Roney vs. State, 44 Wis.2d 522 at 533-534. Also, the trial court at issue here conducted at pretrial hearing to determine the admissibility of the statement after hearing testimony from the state's officers. Id. at 527.

Wisconsin has had a long standing practice of having police officers testify, on behalf of the State, at pretrial hearings to

determine the admissibility of confessions. See e.g., State vs. Owens, 148 Wis.2d 922, 436 N.W.2d 869 (1989); State vs. Armstrong, 223 Wis.2d 331, 588 N.W.2d 606 (1999). This is to sort out conflicts in testimony to determine factual disputes. In State vs. Owens, the Supreme Court indicated that trial courts have the duty to sort out conflicts in testimony in order to make findings of fact. Among the things that are critical to the resolution of a factual issue presented is the nuances in the attorney's questions and the witnesses' answers, created by among other things, the manner in which the questions are asked or the answers given. Only the trial court is exposed to these nuances. State vs. Owens, 148 Wis.2d 922 at 930.

Clearly, the Supreme Court has indicated in State vs. Owens, that where factual disputes are at issue, such as in the present instance, then a fair evidentiary hearing requires live police officer testimony to support the state's case.

Mr. Kastenson was ineffective for failing to object to the trial court's decision to conduct the Motion hearing, with respect to the State's case, solely upon the police reports. Clearly, as indicated herein, an objection to such a decision had a significant basis in both law and fact. Furthermore, these are published cases, so it is not an isolated, unknown area of the law. Simple research would have disclosed these cases and their implications. Failure to present a valid defense or argument that is submissible constitutes ineffective assistance of counsel. State vs. Felton, 110 Wis.2d 485 at 516, 329 N.W.2d 161 (1983).

True, attorney Kastenson argued in summation that the use of mere police reports failed to satisfy the State's burden of proof. However, such an argument does not go to the conclusion that the hearing, as conducted, was improper and in violation of Defendant's Due Process Rights. Accordingly, such an argument does not preserve the objection that the hearing, as conducted, should not have occurred in the first place.

C. The police report had not been properly authenticated. The Court of Appeals' Decision to the contrary is incorrect. Trial counsel was prejudicially ineffective for failing to object to the trial court's consideration of the police reports at the Motion hearing.

The question of authenticity is preliminary to the question of admissibility. Authenticity is satisfied if the proponent of the evidence shows sufficient proof to the court to support a finding by the court "that the matter in question is what its proponent claims." City of New Berlin vs. Wertz, 105 Wis.2d 670, 314 N.W.2d 911 (Ct.App. 1981). The authenticity of a writing or statement is not a question of the application of a technical rule of evidence. It goes to genuineness and relevance. Judicial Council Committee Notes (1974) to Wis. Stats. 909.01, citing "McCormick's on Evidence", section 194.

The requirements of authentication as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Wis. Stats. 909.01. Unauthenticated ledger and signature cards were not competent evidence. Bruckner vs. Prairie Fed.

Savings and Loan Association, 81 Wis.2d 215, 260 N.W.2d 256 (1977).

Here, the police report was not legally and properly authenticated at the Motion to Suppress hearing. The State did not present any evidence that the police reports were what they purported to be. Furthermore, there was no evidence that Defendant provided any of the information/"signatures" within these alleged reports. In conclusion, there was no evidence that these alleged police reports, and/or the information herein, were in fact genuine. They are not self-authenticating documents. Therefore, the State did not meet its burden of proof. Attorney Kastenson never objected.

True, Attorney Kastenson attached this report as part of Defendant's Motion to Sever. The State did not proffer these reports to the trial court. However, there was no indication that Attorney Kastenson had any personal knowledge or ability to authenticate these reports. He merely attached certain pieces of paper to the Motion to Sever that had been provided to him by the State as part of its discovery process. Furthermore, at no time did he stipulate to these police reports for purposes of the Motion hearing.

Attorney Kastenson did argue, during summation arguments, that the police report was mere pieces of paper. However, this is not an objection on the basis of authentication. Such an objection would have been an objection precedent to the trial court's consideration of the "piece of paper" in the first place.

Such an objection would have preserved the record with respect to this issue. This did not happen.

The Court of Appeals Decision relied upon the Defendant's own testimony to base its conclusion that the police report was properly authenticated. The Decision did not indicate that the documents themselves were self-authenticating. (A108-109, Para 14). However, Defendants do not have the burden of proof at Fifth Amendment Motion to Suppress hearings. They do not have to testify. They may take the stand, which is discretionary. State ex rel. Goodchild vs. Burke, 27 Wis.2d 244 at 265. The State has this burden of proof, both with respect to voluntariness as well as to Miranda. State vs. Armstrong, 223 Wis.2d 331, 588 N.W.2d 606 (1999). However, in the present situation, the trial court concluded that the State had met its burden of proof upon the unauthenticated police reports prior to the Defendant taking the stand. The trial court did not have the authority to conclude that the police report was properly authenticated as part of its conclusion that the State had met its burden of proof. The police report was the State's evidence in order to meet this burden. This was prior to the Defendant's presentation of his case, which included his discretionary testimony. Accordingly, the Court of Appeals Decision erroneously concludes that the Defendant's own testimony authenticated the police reports so as to satisfy the State's authentication requirements.

This argument, presented herein, does not waive the Defendant's position, as indicated within this Brief, that the

police report would not have been an adequate substitute for live testimony.

II. THE COURT OF APPEALS' DECISION IS LEGALLY INSUFFICIENT FOR OTHER MULTIPLE REASONS. ACCORDINGLY, THIS DECISION IS IMPROPER.

A. The Wisconsin Supreme Court's Rules and Orders promulgating the Rules of Evidence do not support the Court's conclusion with respect to its analysis. This analysis is with respect to the applicability of the Rules of Evidence at a Suppression of Statements Motion Hearing.

Rule 911 of the Wisconsin Rules of Evidence does not exempt habeas corpus proceedings. Sup. Ct. Order, 59 Wis.2d R376 (1973). In this Order, the Supreme Court analyzed the history of habeas corpus law and determined that such proceedings require that the trial court hear testimony. The Supreme Court bases this conclusion upon the previously cited U.S. Supreme Court case of Townsend vs. Sain, with demeanor evidence as a significant factor. Sup. Ct. Order, 59 Wis.2d R376 citing Townsend vs. Sain, 372 U.S. 322, 83 S.Ct. 745. .

As previously discussed, Townsend vs. Sain was very critical in the determination and history of the definition of a "fair evidentiary hearing." It discussed the need for such demeanor consideration in the context of a Motion to Suppress Statements, and was an important "building block" in the U.S. Supreme Court's subsequent ruling in Jackson vs. Denno.

Furthermore, the Supreme Court Rules do not allow for the use of disposing of habeas corpus matters via affidavit. The Supreme Court analyzed another U.S. Supreme Court case, Walker

vs. Johnston, for the conclusion that affidavits do not satisfy the requirement that the judge shall determine the facts of the case by hearing testimony and arguments. Sup. Ct. Order, 59 Wis.2d R376 (1973) citing Walker vs. Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).

As one can see, the Wisconsin Supreme Court's Orders promulgating Wis. Stats. 911 exempt hearings such as Miranda-Goodchild hearings. Accordingly, the trial court erroneously concluded that it did not need to follow the Rules of Evidence in Miranda-Goodchild Motion hearings. True, Wis. Stats. 911.01(4)(a) does state that the Rules of Evidence are inapplicable with respect to the determination of questions of fact preliminary to the admissibility of evidence when the issue is to be determined by the judge under Wis. Stats. 901.04(1). Wis. Stats. 911.01(4)(a). However, this Statute does not deal specifically with the issue of the Rules of Evidence at Miranda-Goodchild hearings. Simply, the trial court has interpreted Wis. Stats. 911.02(4)(a) much too broadly. Accordingly, one must look to the Supreme Court history of this Rule. As indicated, the Supreme Court has exempted hearings such as Miranda-Goodchild hearings from this Rule.

The Court of Appeals cites the Judicial Council Committee Note to Wis. Stats. 901.04(1) and 911.01(4)(a). True, the Note provides that, as indicated by the Statute, that judges are to decide preliminary questions concerning the admissibility of confessions. However, the Note cites State ex rel. Goodchild vs.

Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965) as the basis for this conclusion. Sup. Ct. Order, 59 Wis.2d R1 at R15-16 (1974). As previously discussed, this case cites Jackson vs. Denno as the basis of its holding.

Based upon the foregoing, the Court of Appeals has misinterpreted Wisconsin Statutes 911.01(4)(a).

B. The Supporting Cases cited by the Decision are inapplicable and, hence, misused.

The Court of Appeals' Decision cites case law for its support. However, this case law is inapplicable and irrelevant.

The Decision cites State vs. Frambs, a 1990 Court of Appeals case, for the purported proposition that Wisconsin's exemption of suppression hearings from the rules of evidence is consistent with a criminal defendant's constitutional right to confront a witness. However, this case is improperly used. In Frambs, the investigating police officer and an Assistant District Attorney testified at a pretrial hearing. At this hearing, the State sought to suppress an alleged exculpatory statement made by an unavailable potential Defense witness. These witnesses testified on behalf of the State as to statements that this potential witness made to them. In these statements, the witness indicated that he was scared of the Defendant and feared for his life. Defendant objected to the introduction of these statements at the pretrial hearing on the basis of hearsay. State vs. Frambs, 157 Wis.2d 700, 460 N.W.2d 811 (Ct.App. 1990).

In Frambs, the Court of Appeals found that the hearsay

statements introduced by the State were admissible at this pretrial hearing. The Rules of Evidence did not apply at such pretrial hearings. (A108, Para 13). However, this was not a Miranda-Goodchild Fifth Amendment Suppression hearing. As indicated, the Rules of Evidence do apply at such hearings. Furthermore, in Frambs, the State introduced the hearsay statements through live testimony. The trial court had the opportunity to observe demeanor. Accordingly, this case is inapplicable to the present situation. Both the trial court and Court of Appeals miscites this case.

Finally, the Decision cites two U.S. Supreme Court cases and a U.S. Court of Appeals case. (A107-108, Para 13). In U.S. vs. Matlock, the U.S. Supreme Court allowed the admission of hearsay non-consent at a Fourth Amendment Motion hearing. U.S. vs. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). In U.S. vs. Raddatz, the U.S. Supreme Court held constitutional the federal statutory procedure whereby a U.S. District Court, reviewing a Magistrate's Decision after an evidentiary suppression hearing, does not have to rehear the testimony but may instead consider the evidentiary hearing transcript. At the evidentiary hearing, the Magistrate heard live testimony. U.S. vs. Raddatz, 447 U.S. 667, 100 S.Ct. 2406 (1980). Finally, in U.S. vs. Schaefer, the Court of Appeals for the First Circuit allowed the admission of a police report indicating non-consent after the author of that report testified. U.S. vs. Schaefer, 87 F.3d 562 (1st Cir. 1996). However, all three cases are inapplicable.

First, none of the above-cited cases applied to Motion to Suppress Statements hearings. Clearly, as indicated throughout this Brief, this is relevant and crucial. Both Jackson vs. Denno and Townsend vs. Sain, and as interpreted by Wisconsin case law, apply specifically to such hearings. Second, in all three of the cited cases, live testimony existed to support the evidence. U.S. vs. Matlock, 94 S.Ct. 988 at 995; U.S vs. Raddatz, 100 S.Ct. 2406 at 2409; U.S. vs. Schaefer, 87 F.3d 562 at 570. Accordingly, the trial courts had the opportunity to observe the demeanor of the testifying officers and witnesses. Furthermore, live testimony existed to authenticate the out of court evidence. Furthermore, Raddatz did not deal with the Federal Rules of Evidence. It dealt with review procedures established by Federal Statutes that allowed a District Court judge to review a Federal Magistrate's evidentiary ruling without rehearing all of the live evidence. All of the facts indicated within this paragraph show that these cited cases are irrelevant to the present situation.

Interestingly, U.S. vs. Raddatz involved a suppression motion hearing at which Raddatz sought to suppress a statement that he provided to federal investigators. The Federal Magistrate conducted an evidentiary hearing at which both Raddatz and the federal agents testified. U.S. vs. Raddatz, 100 S.Ct. 2406 at 2409. Accordingly, the Magistrate had the opportunity to observe the demeanor of all of the testifying witnesses. The Magistrate ruled against Raddatz. Raddatz objected to this ruling and asked the District Court to review it. The sole issue before the U.S.

Supreme Court concerning hearsay was whether or not the District Court was required to rehear the live witnesses, or whether it could review the Magistrate's ruling based solely upon the hearing transcript. This issue was presented as a Due Process issue. Id. at 2411.

In Raddatz, the Supreme Court held that the District Court did not have to rehear the witnesses. However, the Supreme Court gave a great deal of deference to credibility and the importance of actually hearing witnesses. The Supreme Court indicated that a District Court should not reject a Magistrate's proposed findings on credibility. The Supreme Court indicated:

> "The issue is not before us, but we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." Id. at 2415, Footnote 7.

The Supreme Court also indicated that the District Court could recall witnesses to resolve credibility issues. Id. at 2412.

Here, clearly, the Supreme Court in Raddatz supported the proposition that Due Process required that a Magistrate deciding a statement suppression hearing should hear live testimony. This is in accordance with the U.S. Supreme Court and the Wisconsin case law. All of this case law has been cited and discussed. However, this is contrary to the Court of Appeals' Decision. Accordingly, the Court of Appeals' use of these cases is erroneous.

III. THE COURT OF APPEALS ERRED IN DETERMINING THAT THE STATE'S EVIDENCE MET THE REQUISITE BURDEN OF PROOF. THE LACK OF LIVE TESTIMONY AND UNAUTHENTICATED REPORTS FAILED TO SATISFY SUCH BURDEN.

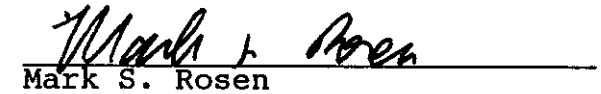
For all of the reasons indicated, the State failed to meet its burden of proof at the Miranda-Goodchild hearing. State vs. Armstrong, 223 Wis.2d 331 at 345-347. The lack of live testimony failed to satisfy the reasons that such testimony is necessary. The trial court could not consider the demeanor of any police officers that allegedly took the statement. One cannot simply assume, as indicated by the case law cited within this Brief, that police officers never lie. There was no basis for the court's conclusion that the statements indicated in the reports were reliable. Furthermore, the reports themselves were not authenticated by any police officer. They were mere pieces of paper that contained writing. They were not even in affidavit form, although case law states that affidavits are insufficient at Miranda-Goodchild hearings. Accordingly, the trial court abused its discretion in improperly denying Defendant's Motion to Suppress Statements.

CONCLUSION

WHEREFORE, For the Reasons Indicated Above, JOSEPH JILES, by and through his attorney Mark S. Rosen of the Law Offices of Rosen and Holzman, hereby requests that this Honorable Court

reverse the Decision of the Court of Appeals as well as the Decision and Order of the Trial Court.

Respectfully Submitted,



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COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0153-CR Cir. Ct. No. 00 CF 2479

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH F. JILES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT C. CRAWFORD, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Joseph F. Jiles appeals from a judgment entered after he pled guilty to one count of first-degree reckless injury with the use of a dangerous weapon, as a party to a crime, and one count of armed robbery with the

use of force, as a party to a crime. *See* WIS. STAT. §§ 940.23(1)(a); 939.63; 939.05; and 943.32(2) (1999-2000).[1] He also appeals from an order denying his postconviction motion. Jiles claims that his trial counsel was ineffective when the lawyer did not object to alleged errors at a ***Miranda-Goodchild*** hearing and at sentencing because: (1) the trial court's reliance on police reports instead of live testimony at the ***Miranda-Goodchild*** hearing violated due process; (2) police reports upon which the trial court relied were not properly authenticated; and (3) the trial court relied on inaccurate sentencing information. Jiles also alleges that the trial court erred when it: (1) erroneously concluded that it was not required to follow the rules of evidence at the ***Miranda-Goodchild*** hearing; and (2) denied his motion to suppress because, he contends, the State failed to meet its burden of proof.[2] We affirm.

I.

¶2 Joseph F. Jiles and Lyron T. Wilson robbed Evelyn Payton and shot her in the head. According to the complaint, the robbery occurred when Payton stopped at a gas station on her way home from work. Jiles and Wilson approached Payton as she was getting into her car. They tried to grab her purse, but were unable to reach it. Jiles and Wilson then tried to take her car keys. Payton struggled with them and was shot near her temple. Jiles and Wilson took her keys

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and, also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

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and ran away. As a result of the shooting, Payton lost her left eye, has two plates in her face, and suffers from extensive facial nerve damage.

¶3 Jiles gave a statement to the police the next day. According to the police report recounting the statement, the interviewing detective informed Jiles of his ***Miranda*** rights. Jiles indicated that he understood and waived those rights. Jiles then told the detective that he and "Ready Rell" (Wilson) walked over to Payton and grabbed her. According to Jiles's statement, she did not have a purse, so he grabbed a key chain with a sack on it because he "figured" that was where she kept her money. Jiles then ran away with the key chain. As he was running, he heard a shot and saw "Ready Rell" running behind him. Jiles and "Ready Rell" were apprehended by the police a few minutes later. Jiles signed his name at the bottom of his written statement.

¶4 Jiles filed a motion to suppress the statement, alleging that: he was not informed of his ***Miranda*** rights, his confession was involuntary because he was intoxicated from using marijuana prior to his arrest, and his statements were the result of overbearing police conduct. At the ***Miranda-Goodchild*** hearing, the trial court relied upon Jiles's police report for the State's version of the facts. As noted, the report indicated that Jiles had been advised of and waived his ***Miranda*** rights. The report also indicated that Jiles gave his statement approximately four and one-half hours after he was arrested and that Jiles told the detective that he was not under the influence of drugs or alcohol.

¶5 Jiles also testified at the hearing. He claimed that the detective did not inform him of his ***Miranda*** rights. Jiles testified that he was still high on marijuana when he gave the statement and that the detective asked him "all kinds of crazy questions ... [l]ike how old was I and like do I have any brothers or

sisters; stuff like that." When asked by the State, Jiles admitted that he saw the police report "[t]he same night he [the detective] was asking me questions." Jiles also admitted that the signature on the report was his.

¶6 The trial court denied Jiles's motion to suppress his confession. It found that Jiles was not credible and concluded that Jiles had received and waived his ***Miranda*** rights. The trial court also concluded that Jiles's statement was voluntary because "Mr. Jiles'[s] ability to make informed choices was not overborne by any marijuana which he may have consumed prior to his arrest."

¶7 Jiles pled guilty and the trial court sentenced him to twenty years in prison on count one (first-degree reckless injury) and forty years in prison on count two (armed robbery), consecutive to count one.[3] Jiles filed a postconviction motion requesting, among other things, a ***Machner*** hearing.[4] He alleged that his trial counsel was ineffective for failing to object to several alleged errors that occurred at the ***Miranda-Goodchild*** hearing and at sentencing. The trial court denied the motion without a hearing.

II.

A. Ineffective Assistance of Counsel

¶8 The familiar two-pronged test for ineffective-assistance-of-counsel claims requires a defendant to prove: (1) deficient performance; and (2) prejudice.

[3] The trial court imposed Jiles's twenty-year sentence for first-degree reckless injury to consist of fifteen years of confinement and five years of extended supervision and his forty-year sentence for armed robbery to consist of twenty years of confinement and twenty years of extended supervision.

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690. There is a "strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990).

¶9 To prove prejudice, a defendant must show that counsel's errors were so serious that the defendant was deprived of a fair trial and a reliable outcome. *Strickland*, 466 U.S. at 687. To succeed, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶10 Our standard for reviewing an ineffective-assistance-of-counsel claim involves a mixed question of law and fact. *Johnson*, 153 Wis. 2d at 127, 449 N.W.2d at 848. Findings of fact will not be disturbed unless they are clearly erroneous. *Id.* The legal conclusions, however, as to whether counsel's performance was deficient and prejudicial, are questions of law. *Id.*, 153 Wis. 2d at 128, 449 N.W.2d at 848. We need not address both *Strickland* prongs if the defendant fails to make a sufficient showing on either one. *Strickland*, 466 U.S. at 697.

¶11 Before a trial court must grant a *Machner* hearing on an ineffective-assistance-of-counsel claim, the defendant must allege sufficient facts to raise a question of fact for the court. *State v. Washington*, 176 Wis. 2d 205, 214–215, 500 N.W.2d 331, 335–336 (Ct. App. 1993). A conclusory allegation, unsupported by factual assertions, is legally insufficient and does not require the trial court to conduct a *Machner* hearing. *Id.* Although the "nature and specificity of the

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required supporting facts will necessarily differ from case to case ... a defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim." ***State v. Bentley***, 201 Wis. 2d 303, 313–314, 548 N.W.2d 50, 55 (1996). This presents a question of law that we review *de novo*. ***Id.***, 201 Wis. 2d at 310, 548 N.W.2d at 53.[5]

¶12 First, Jiles alleges that his trial counsel was ineffective for failing to object when the trial court relied upon the police report at the ***Miranda-Goodchild*** hearing.[6] Jiles claims that this violated his due-process right to a full and fair hearing because the trial court could not determine the credibility of "the police officer ... based upon paper." We disagree.

¶13 Under WIS. STAT. RULE 901.04(1), a trial court is not bound by the rules of evidence when it makes a preliminary determination on the admissibility of evidence. RULE 901.04(1) provides:

> **Preliminary questions.** (1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2). *In making the determination*

[5] In addition to a ***Machner*** hearing, Jiles requests "reversal of the court's denial of the suppression motion[;] withdrawal of [his] guilty pleas; and/or a new sentencing hearing." (Capitalization and underlining omitted.) A ***Machner*** hearing, however, is a prerequisite to granting relief on an ineffective-assistance-of-counsel claim. *See* ***State v. Curtis***, 218 Wis. 2d 550, 554–555, 582 N.W.2d 409, 410 (Ct. App. 1998). Thus, we address Jiles's allegations under an ineffective-assistance-of-counsel standard to determine whether a ***Machner*** hearing is warranted.

[6] Jiles alleges that his trial lawyer "was prejudicially ineffective for failing to properly object to the trial court's conducting the Motion to Suppress hearing based solely upon the police reports." (Underlining omitted.) There are two problems with this allegation. First, the trial court only relied upon one police report (Jiles's) at the hearing. Second, the trial court did not conduct the hearing based solely upon the police report—it also heard Jiles's testimony.

> *the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.*

(Emphasis added.) Under RULE 901.04(1), the trial court was not bound by the rules of evidence at Jiles's ***Miranda-Goodchild*** hearing—it was making a determination on the admissibility of Jiles's confession.[7] Whether police properly informed a defendant of his or her ***Miranda*** rights is a decision made by the court under RULE 901.04(1). *See* ***United States v. Raddatz***, 447 U.S. 667, 679 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial."); *see also* ***United States v. Matlock***, 415 U.S. 164, 172 (1974) ("[T]he rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the

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[7] This proposition is reinforced by the Judicial Council Committee's Note to WIS. STAT. RULE 901.04(1) and WIS. STAT. RULE 911.01(4)(a). The Judicial Council Committee's Note provides:

> This subsection is consistent with Wisconsin decisions that the trial court determines: a witness's qualification, existence of a privilege, and *the admissibility of a confession.* Exoneration of the trial judge from the rules of evidence in making his [or her] determination has not been articulated in Wisconsin decisions, but s. 262.17 (1) (b) provides for proof of service by affidavit and ss. 269.32, 269.45, 270.50 and 270.635 permit rulings on motions based upon affidavits. The second sentence deviates from the federal rule only in the interest of clarity; no change of substance is needed.

Wisconsin Rules of Evidence 59 Wis. 2d Rp. 15–16 (citations omitted) (emphasis added). Moreover, RULE 911.01(4)(a) provides:

> (4) RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:
>
> (a) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04 (1).

judge to determine the admissibility of evidence."). Thus, the trial court properly relied upon the police report—RULE 901.04(1) permitted its use at the hearing regardless of whether it would have been admissible under the rules of evidence at trial. *See also* ***State v. Frambs***, 157 Wis. 2d 700, 704, 460 N.W.2d 811, 813 (Ct. App. 1990) (confrontation clause does not apply to trial court's responsibilities under RULE 901.04(1)). Accordingly, Jiles has neither shown that his trial counsel's performance was deficient nor shown that he suffered any prejudice—any objection that counsel would have made to the admission of the police report would have been meritless.

¶14 Second, Jiles alleges that his trial counsel was ineffective when the lawyer did not object to the admission of the police report at the hearing because the report was not properly authenticated. We disagree. As noted, the rules of evidence did not apply to Jiles's hearing. Moreover, a document is authenticated when "evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. RULE 909.01. At the hearing, Jiles testified that he recognized the police report and that the signature on the report was his.[8]

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[8] On direct-examination, Jiles testified as follows:

> Q. I'm going to show you three pages here of writing [the police report]. And have you ever seen this before?
>
> A. Yes.
>
> Q. When did you see it?
>
> A. The same night he was asking me questions.
>
> Q. All right. I'm going to show you on page two there what looks like a signature, Joseph Jiles. Is that your signature?
>
> A. Yes.

Thus, the police report was properly authenticated. *See* WIS. STAT. RULE 909.015(1) and (2) (examples of authentication include the testimony of a witness with knowledge and a non-expert opinion on the genuineness of handwriting). Further, Jiles does not point us to anything, other than his mere unsupported assertion, that raises a question that the report was not what it purported to be. Jiles has not established that he was deprived of the effective assistance of counsel in connection with the trial court's use of the police report.

¶15 Third, Jiles alleges that his trial counsel was ineffective because the lawyer did not object to the trial court's reliance upon alleged inaccurate information when it sentenced him. At sentencing, the trial court commented:

> In many respects though it's an accident as to whether it was you [Wilson] or Mr. Jiles who held the gun in your hands because I understand that the two of you passed the gun back and forth. Mr. Jiles told me when he pled guilty that the two of you passed the gun back and forth as you walked on 27th Street.

Jiles alleges that this information is inaccurate because he never made this statement.

¶16 Jiles's allegation concerning the trial court's statement at sentencing is conclusory and undeveloped. While Jiles correctly asserts that *he* never made this statement, Jiles does not allege that the critical element of his allegation, the underlying fact that he passed the gun back and forth to Williams, is incorrect. Indeed, even in his reply brief, Jiles fails to allege or offer any proof that the information itself, not the source of the information, is false. Jiles simply claims that "[h]e does not have to disprove such non-information." Jiles misinterprets the standard for an ineffective-assistance-of-counsel claim—before a trial court must grant a ***Machner*** hearing, *the defendant* must allege sufficient facts to raise a

question of fact for the court. *See* ***Washington***, 176 Wis. 2d at 214–215, 500 N.W.2d at 335–336. Here, Jiles fails to allege facts sufficient to raise a question of fact regarding the accuracy of the information. Accordingly, the trial court properly denied Jiles's postconviction motion without a ***Machner*** hearing.

B. Trial Court Error

¶17 Jiles also alleges that the trial court erred in two respects when it conducted the ***Miranda-Goodchild*** hearing. First, Jiles claims that the trial court's order denying his motion for postconviction relief was "improper" because the trial court erroneously concluded that it was not required to follow the rules of evidence at the ***Miranda-Goodchild*** hearing. Again, we disagree. We have already decided that the trial court was not bound by the rules of evidence because the ***Miranda-Goodchild*** hearing concerned a determination on the admissibility of Jiles's confession.

¶18 Second, Jiles alleges that the trial court erred when it denied his motion to suppress because, "[f]or all of the reasons indicated, the State failed to meet its burden of proof at the Miranda-Goodchild hearing." This argument is simply a rehash of Jiles's prior allegations—it adds nothing to the arguments that we have already rejected. Accordingly, we decline to further address it. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989) ("[l]arding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; 'zero plus zero equals zero'") (quoted source omitted).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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CERTIFICATION

I hereby certify that the Supreme Court Brief of Defendant-Appellant-Petitioner in the matter of State of Wisconsin vs. Joseph Jiles, 02-0153-CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is thirty (30) pages.

Dated this 11th day of March, 2003, in Waukesha, Wisconsin.

Mark S. Rosen
Attorney for Defendant-Appellant-Petitioner

STATE OF WISCONSIN

SUPREME COURT

Case No. 02-0153-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH JILES,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, HONORABLE ROBERT CRAWFORD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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SUPREME COURT

Case No. 02-0153-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH JILES,

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ON REVIEW OF A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, HONORABLE ROBERT CRAWFORD, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting this case for review, this court has indicated that it is deserving of both oral argument and publication.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED, WITHOUT A HEARING, JILES'S MOTION FOR A NEW TRIAL BASED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. The issue presented and the standards by which its merits must be judged.

In the section of his brief setting out the "issues presented for review" (Jiles's brief at 1; capitalization and underlining deleted), Jiles does not neatly and succinctly set out, in enumerated fashion, the issues he is presenting for this court's review. A reading of that section of his brief, however, reveals that he is attacking that portion of the court of appeals' decision in this case that upheld the trial court's reception into evidence, and reliance on, a police report at the suppression hearing held in this case. The subject of the suppression hearing in question was the admissibility of Jiles's statement to the police. The police report at issue detailed the circumstances surrounding the making of that statement. Jiles contends that the trial court could not properly receive that police report into evidence, and rely on it, in resolving the question of the admissibility of his statement to the police because: (1) live testimony, rather than the hearsay police report, was required—perhaps not as an evidentiary matter, but as a matter of due process—to establish the facts contained in the report; and (2) the police report was not properly authenticated.

To properly assess the merits of Jiles's complaint about the police report, and to determine whether that complaint entitles him to any relief on this appeal and, if it does, what that relief might be, it is first necessary to identify the context in which the complaint is raised. This case does *not* present a direct attack on the trial court's reception of, and

reliance on, the police report at the suppression hearing. If it did, this appeal could be easily disposed of. At the suppression hearing, Jiles's counsel never objected to receipt and consideration of the police report. That lack of an objection plainly waived any evidentiary or constitutional objection to receipt of the report. *See, generally, State v. Veach*, 2002 WI 110, ¶99, 255 Wis. 2d 390, 648 N.W.2d 447 (evidentiary objection waived by failure to object); *State v. Koller*, 2001 WI App 253, ¶41, 248 Wis. 2d 259, 635 N.W.2d 838 (constitutional objection waived by failure to object). Moreover, with no objection to it, the report could properly be relied on by the trial court to establish the facts asserted in it, even if it was inadmissible hearsay:

> Hearsay evidence, although it may be objected to, is nevertheless probative; and if it is admitted without objection, the judge and jury have the right to rely on it.

Caccitolo v. State, 69 Wis. 2d 102, 113, 230 N.W.2d 139 (1975); *accord State v. Heredia*, 172 Wis. 2d 479, 482 n.1, 493 N.W.2d 404 (Ct. App. 1992) ("Unobjected-to hearsay is, of course, admissible for its truth."); *State v. Jenkins*, 168 Wis. 2d 175, 203, 483 N.W.2d 262 (Ct. App. 1992) ("Unobjected-to-hearsay is admissible as substantive evidence.").

Rather than presenting a direct attack on the trial court's receipt of, and reliance on, the police report, this case presents an attack on the failure of Jiles's trial-court counsel to object to the trial court's receipt of, and reliance on, the police report. Jiles recognizes that his trial-court counsel "d[id] not preserve [his] objection" to the way the trial court conducted the suppression hearing (Jiles's brief at 20). To avoid the waiver of that objection that flows from the failure to preserve it, Jiles asserts that his counsel "was ineffective for failing to object to the trial court's decision to conduct the Motion hearing, with respect to the State's case, solely upon the police reports" (Jiles's brief at 19).

The standards by which the merits of a claim of ineffective assistance of counsel must be judged are well established. They are set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under that decision, a defendant claiming ineffective assistance of counsel must affirmatively show that: (1) counsel's performance was deficient; (2) the deficient performance prejudiced the defense.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687.

With respect to the "performance" prong of the test, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Reviewing courts are strongly cautioned to avoid gratuitous second-guessing after a defense ultimately proves to be unsuccessful: "Judicial scrutiny of counsel's performance must be highly deferential. . . . [T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

With respect to the "prejudice" component of the test, a criminal defendant must affirmatively prove that the

alleged defects in counsel's performance "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. A defendant cannot meet his burden by merely showing that the errors had "some conceivable effect on the outcome," *id.*; rather, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Jiles filed, in the trial court, a postconviction motion raising his ineffective-assistance-of-counsel claim and requesting a hearing on that claim (31). The trial court denied the motion without a hearing (32:10). Thus, this case is presently in a posture that would preclude a finding that Jiles was denied the effective assistance of counsel. Such a finding cannot be made in the absence of a hearing at which Jiles's trial-court counsel would be permitted to explain his reasons for failing to object to the manner in which the trial court conducted the suppression hearing.

State v. Machner, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), requires such a hearing as a prerequisite to granting relief based on a claim of ineffective assistance of counsel. As the court of appeals pointed out in *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998):

> Curtis claims that trial counsel was ineffective in failing to cite case law in his motion to suppress the tapes and in failing to request an in camera review of the tapes prior to their admission as evidence. Curtis acknowledges that the court of appeals has held that a postconviction *Machner* hearing is a prerequisite to a claim of ineffective assistance of counsel. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). He appears to contend, however, that a *Machner* hearing is not necessary in every case. . . .

> We read *Machner* to preclude Curtis' interpretation. While the *Machner* court did not explicitly specify that a hearing was required in every case, we construe it to mean just that. The court held in *Machner* that "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *Id.* The hearing is important not only to give trial counsel a chance to explain his or her actions, but also to allow the trial court, which is in the best position to judge counsel's performance, to rule on the motion. This dual purpose renders the hearing essential in every case where a claim of ineffective assistance of counsel is raised. Here, the lack of a *Machner* hearing prevents our review of trial counsel's performance.

Under *Curtis*, the lack of a *Machner* hearing prevents this court from finding that Jiles was denied the effective assistance of counsel.[1] That, however, does not fully dispose of the claim of ineffective assistance of counsel that is being raised on this appeal. There remains for consideration the question whether, in response to Jiles's postconviction motion raising his claim of ineffective

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[1]The state does not invoke *Curtis* and *Machner* simply to place a technical roadblock, having no practical significance, in Jiles's path to relief based on ineffective assistance of counsel. With respect to the police report, there were potentially two issues Jiles could have raised: (1) since it was hearsay, was it inadmissible at the suppression hearing? (2) was it in itself sufficient to sustain the state's burden at the suppression hearing? At the suppression hearing, Jiles's trial-court counsel raised the second issue, arguing that the unsworn hearsay in the report was not sufficient to defeat Jiles's testimony establishing constitutional deficiencies in the obtaining of his statements (38:35). Had Jiles's trial-court counsel successfully objected to receipt and use of the police report (the first issue), he would not have been able to argue the second issue. It is at least arguable that competent counsel could have declined to raise the first issue in order to preserve the ability to raise the second. A hearing, at which Jiles's trial-court counsel could possibly provide that explanation for not raising the first issue, or some other rational explanation for not raising it, is necessary to determine whether Jiles's trial-court counsel performed deficiently in not raising the first issue even if his potential argument on that issue would have had merit.

assistance of counsel, he should have been granted a *Machner* hearing. Although under *Curtis* Jiles cannot succeed on his claim of ineffective assistance of counsel given the present posture of this case, he could possibly be entitled to a *Machner* hearing at which he is given the opportunity to establish that he was denied the effective assistance of counsel.

Jiles's entitlement to a *Machner* hearing turns on whether the allegations in his postconviction motion raising his ineffective-assistance-of-counsel claim were sufficient to require one. The leading decision dealing generally with whether the allegations of a postconviction motion raising a claim of ineffective assistance of counsel are sufficient to warrant an evidentiary hearing is *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). In *Bentley*, this court adopted the standard set out in *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), for determining whether a hearing on a postconviction motion is required (in *Nelson*, the postconviction motion sought withdrawal of a guilty plea; in *Bentley*, the supreme court applied the *Nelson* standard to postconviction motions raising claims of ineffective assistance of counsel):

> We here determine that if a motion . . . alleges facts which, if true, would entitle the defendant to relief, the trial court must hold an evidentiary hearing. However, if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. It is incumbent upon the trial court to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion.

Nelson v. State, 54 Wis. 2d at 497-98, *adopted in State v. Bentley*, 201 Wis. 2d at 309-10.

The foregoing test for determining whether an evidentiary hearing is required when a defendant brings a

postconviction motion for a new trial based on ineffective assistance of counsel, which the state will hereinafter refer to as the "*Nelson-Bentley* test," has two parts, each governed by a different standard of appellate review:

> [W]e conclude that *Nelson* sets forth a two-part test which necessitates a mixed standard of appellate review. If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. Whether a motion alleges facts which, if true, would entitle a defendant to relief is a question of law that we review de novo.
>
> However, if the motion fails to allege sufficient facts, the circuit court has the discretion to deny a postconviction motion without a hearing based on any one of the three factors enumerated in *Nelson*. When reviewing a circuit court's discretionary act, this court uses the deferential erroneous exercise of discretion standard.

State v. Bentley, 201 Wis. 2d at 310-11 (citations omitted).

In the following subsections of this brief, the state will examine the alleged defects in the representation provided by Jiles's trial-court counsel to see whether Jiles's allegations concerning them were sufficient, under the *Nelson-Bentley* test, to entitle him to a hearing on his claim of ineffective assistance of counsel. That examination will be conducted in light of the general standards governing the determination of the merits of a claim of ineffective assistance of counsel that were laid out at the beginning of this section of the state's brief. In other words, with respect to the claimed defects in trial counsel's performance, the state will address the question whether the allegations in Jiles's postconviction motion were sufficient to raise an issue, first, with respect to deficient performance and, second, with respect to prejudice, the two prongs of the test for ineffective assistance of counsel, both of which must be met before an attorney can be deemed to have provided ineffective representation.

B. Jiles's claim that his trial-court counsel failed to properly object, on due process grounds, to the trial court's receipt and consideration of the police report at his suppression hearing.

1. Deficient performance.

a. Jiles's complaint.

As indicated above, Jiles contends that his trial-court counsel "was ineffective for failing to object to the trial court's decision to conduct the Motion hearing, with respect to the State's case, solely upon the police reports" (Jiles's brief at 19). As will be seen, a reasonably competent attorney could have concluded that an objection was not warranted, so trial-court counsel cannot be said to have performed deficiently in failing to make one.

Before proceeding to consideration of the merits of Jiles's claim that his trial-court counsel performed deficiently in failing to object to the use of police reports at the hearing held on Jiles's motion to suppress his statements to the police, the state needs to note a slight, and perhaps inconsequential, error in Jiles's description of what the trial court did. Jiles asserts that the trial court conducted the suppression hearing, with respect to the state's case, solely upon the "police reports," in the plural (Jiles's brief at 19; emphasis supplied). While, at the outset of its consideration of Jiles's suppression motion, the trial court did refer to both of the police reports attached to Jiles's motion to sever—(1) the police report concerning the statement given by Jiles's co-actor, Lyron Wilson; and (2) the police report concerning the statement given by Jiles—it quickly realized that only the second police report—the one concerning the statement Jiles was attempting to suppress—was relevant to the issues presented by Jiles's suppression motion (38:10). Thereafter,

it considered that second police report, and made no further reference whatsoever to the first one. The first one was not relied on in resolving the suppression motion.

b. There was no state evidentiary bar to receipt of the police report.

Jiles's primary, if not exclusive, argument in support of his claim that his trial-court counsel should have objected to the trial court's consideration of the police report is that consideration of that report violated his right to due process. But, before addressing the due process issue Jiles presents, there is a threshold question that needs to be addressed: whether the police report in question, which was unquestionably hearsay, and does not appear to fall within any hearsay exception, *see State v. Williams*, 2002 WI 58, ¶42 n.6, 253 Wis. 2d 99, 644 N.W.2d 919, was inadmissible at the suppression hearing as a matter of state evidentiary law. If it was, his trial-court counsel could be faulted for not objecting on state evidentiary grounds, so there would be no need for this court to consider the due process issue Jiles presents. *See State v. Hall*, 2002 WI App 108, ¶1 n.3, 255 Wis. 2d 662, 648 N.W.2d 41 (appellate courts "'do not decide constitutional issues if the resolution of other issues can dispose of an appeal'").

State evidentiary law does not bar the receipt of hearsay evidence at suppression hearings. Suppression hearings are exempted from the rules of evidence, except for the rules relating to privileges, by two provisions of the Wisconsin Rules of Evidence.

The first is Wis. Stat. § 901.04(1). That section provides as follows:

> **901.04 Preliminary questions. (1)** QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the

> existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31(11) and 972.11(2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

The second is Wis. Stat. § 911.01(4)(a). That section essentially repeats, in slightly different language, what § 901.04(1) says:

> **(4)** RULES OF EVIDENCE INAPPLICABLE. Chapters 901 to 911, other than ch. 905 with respect to privileges or s. 901.05 with respect to admissibility, do not apply in the following situations:
>
> (a) *Preliminary questions of fact.* The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under s. 901.04(1).

Suppression hearings unquestionably deal with "[p]reliminary questions concerning . . . the admissibility of evidence" (the wording of § 901.04(1)) and "[t]he determination of questions of fact preliminary to admissibility of evidence" (the wording of § 911.01(4)(a)). They thus unquestionably fall within the plain language of those two provisions.

Were there any question about that, it would be removed by the Judicial Council Committee's Note to § 901.04(1). That note reads:

> Sub. (1). This subsection is consistent with Wisconsin decisions that the trial judge determines: a witness's qualification, *Colier v. State*, 30 Wis. 2d 101, 140 N. W. 2d 252 (1966); *State v. Schweider*, 5 Wis. 2d 627, 94 N. W. 2d 154 (1959); *Jacobson v. Greyhound Corp.*, 29 Wis. 2d 55, 138 N. W. 2d 133 (1965); existence of a privilege, *Stelloh v. Liban*, 21 Wis. 2d 119, 124 N. W. 2d 101 (1963); *Abraham v. State*, 47 Wis. 2d 44, 176 N. W. 2d 349 (1970); *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 592, 150 N. W. 2d 387, 405 (1967); and the admissibility of a confession, *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N. W. 2d 753 (1965). See J. Wigmore, *Evidence* § 2550 (3d ed. 1940) [hereinafter cited as Wigmore].

> Exoneration of the trial judge from the rules of evidence in making his determination has not been articulated in Wisconsin decisions, but s. 262.17(1)(b) provides for proof of service by affidavit and ss. 269.32, 269.45, 270.50 and 270.635 permit rulings on motions based upon affidavits. The second sentence deviates from the federal rule only in the interest of clarity; no change of substance is intended.

59 Wis. 2d at R15-R16.

The foregoing note expressly recognizes that, consistent with the earlier Wisconsin decision in *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), one of the questions to be determined by the judge under the mandate of § 901.04(1) is "the admissibility of a confession," precisely the question presented at the suppression hearing at issue in this case. The note then proceeds to describe the further effect of § 901.04(1), not previously "articulated in Wisconsin decisions," with respect to the determination of the questions committed to the judge under § 901.04(1), including the question of the admissibility of a confession: in making his or her determination, the trial judge is "[e]xonerat[ed] . . . from the rules of evidence." A clearer recognition of the fact that, under § 901.04(1), a judge is not bound by the rules of evidence, except with respect to privileges, in determining the admissibility of a confession is hard to imagine. The trial court was plainly correct when it concluded that, at least as a matter of state evidentiary law, it was not bound by the rules of evidence at the suppression hearing in this case.

In addition to the Judicial Council Committee's Note to § 901.04(1), there is other authority supporting the state's position that the rules of evidence, other than those with respect to privileges, do not apply at suppression hearings: federal decisions, which are persuasive sources for interpretation of the Wisconsin Rules of Evidence since those rules were based on the Federal Rules of Evidence. *See State v. King*, 205 Wis. 2d 81, 92, 555

N.W.2d 189 (Ct. App. 1996). Those decisions clearly recognize that, under the federal analogues to §§ 901.04(1) and 911.01(4)(a), suppression hearings are exempted from the rules of evidence. *See, e.g., United States v. Jackson*, 213 F.3d 1269, 1281 (10th Cir. 2000); *United States v. Schaefer*, 87 F.3d 562, 570 (1st Cir. 1996); *United States v. Bolin*, 514 F.2d 554, 557 (7th Cir. 1975).

Jiles does not appear to dispute the foregoing, at least not clearly. He recognizes that "the Rules of Evidence do not apply to preliminary questions of the admissibility of evidence" (Jiles brief at 3). While he says that hearsay evidence will not do at a hearing held on a defendant's motion to suppress an inculpatory statement, he expressly recognizes that his position in that regard "does not arise from a discussion of the Rules of Evidence" (Jiles's brief at 12). Rather, it "arises from both United States, and Wisconsin, case law," which, according to Jiles, "mandate[s] a full evidentiary hearing requiring the State to present [live] testimony" as a matter of due process (Jiles's brief at 11, 12-13). Jiles appears to concede that the state's use of hearsay to make out its case at a suppression hearing is not barred by the rules of evidence, arguing instead only that it runs afoul of his right to due process.

There is one point in his brief at which Jiles suggests that §§ 901.04(1) and 911.01(4)(a) do not exempt suppression hearings relating to a defendant's statement from the rules of evidence. He asserts that those provisions do "not deal specifically with the issue of the Rules of Evidence at Miranda-Goodchild hearings" (Jiles's brief at 24). That is true, but irrelevant. The provisions at issue do not deal "specifically" with any particular admissibility hearings. Under Jiles's reasoning, they would thus have no application to any admissibility hearings. But, by their plain language, they do apply to *all* hearings relating to the "admissibility of evidence," which would include

Goodchild-Miranda hearings. And, if that were not clear from the plain language of those provisions, the Judicial Council Committee's Note to § 901.04(1), which expressly refers to *Goodchild* hearings as an example of those hearings within § 901.04(1)'s ambit, would remove any doubt that §§ 901.04(1) and 911.01(4)(a) apply to suppression hearings relating to a defendant's statement.

Moreover, decisions from federal jurisdictions recognize that the exemption from the rules of evidence created by §§ 901.04(1) and 911.01(4)(a) applies to hearings on a defendant's motion to suppress his or her statement. For example, in *United States v. Dickerson*, 166 F.3d 667, 679 n.12 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2002), a case involving a *Miranda* suppression motion, the court noted that "the Federal Rules of Evidence are [not] binding at a suppression hearing," citing Fed. R. Evid. 104(a). And in *United States v. Merritt*, 695 F.2d 1263, 1269 (10th Cir. 1982), the court recognized that, at a hearing "to determine preliminarily the admissibility of certain evidence allegedly obtained in violation of defendant's rights under the Fourth *and Fifth* Amendments" a trial court has "latitude to receive [certain evidence], notwithstanding the hearsay rule" because Rules 104(a) and 1101(d)(1) of the Federal Rules of Evidence exempt such a hearing from the rules of evidence.

In short, there can be no doubt that §§ 901.04(1) and 911.01(4)(a) apply to suppression hearings relating to a defendant's statement. They exempt such hearings from the rules of evidence, in particular, the hearsay rule.

c. United States Supreme Court decisions clearly teach that abrogation of the rules of evidence at suppression hearings and the consideration of hearsay at those hearings do not necessarily violate due process.

Having shown that there was no state evidentiary bar to the trial court's receipt of the police report, this brief now turns to the crux of Jiles's complaint: that receipt of, and reliance on, the police report violated his right to due process[2] and, therefore, his trial-court counsel was ineffective for failing to object to it on that ground. It is Jiles's position that a full and fair hearing on the question of the admissibility of evidence that a defendant claims has been unconstitutionally obtained requires "live testimony" (Jiles's brief at 12, 17, 19). Hearsay will not do.

Controlling United States Supreme Court precedent teaches otherwise. Indeed, in *United States v. Matlock*, 415 U.S. 164, 172-77 (1974), the United States Supreme Court held that the district court had erred in *not* considering, at a suppression hearing, hearsay evidence proffered by the government that was inadmissible under the rules of evidence, in particular, the hearsay rule. The Court stated that "the rules of evidence normally applicable in criminal trials do not operate with full force at

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[2]There was another potential ground for objecting to the trial court's receipt of and reliance on the police report: Jiles's right of confrontation was violated. Jiles, however, does not contend that his trial-court counsel should have objected on that ground, and for good reason. A criminal defendant's right to confrontation has no application to pretrial hearings on the admissibility of evidence. *See State v. Frambs*, 157 Wis. 2d 700, 703-05, 460 N.W.2d 811 (Ct. App. 1990).

hearings before the judge to determine the admissibility of evidence." 415 U.S. at 172-73. It bolstered that point by reference to the counterparts to Wis. Stats. §§ 901.04(1) and 911.01(4)(a) in the Federal Rules of Evidence:

> That the same rules of evidence governing criminal jury trials are not generally thought to govern hearings before a judge to determine evidentiary questions was confirmed on November 20, 1972, when the Court transmitted to Congress the proposed Federal Rules of Evidence. Rule 104(a) provides that preliminary questions concerning admissibility are matters for the judge and that in performing this function he is not bound by the Rules of Evidence except those with respect to privileges. Essentially the same language on the scope of the proposed Rules is repeated in Rule 1101(d)(1).

415 U.S. at 173-74 (footnote omitted).

In *Matlock*, the Supreme Court expressly embraced the view that "there should be no automatic rule against the reception of hearsay evidence [meaning, in context, evidence inadmissible under the hearsay rule because it constitutes hearsay and does not fall within any recognized exception to the hearsay rule] in such proceedings [i.e., suppression hearings]." 415 U.S. at 175.

What the Supreme Court recognized in *Matlock*, it reiterated in *United States v. Raddatz*, 447 U.S. 667, 679 (1980):

> This Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial. *United States v. Matlock*, 415 U.S. 164, 172-174 (1974); *Brinegar v. United States*, 338 U.S. 160, 172-174 (1949); Fed. Rules Evid. 104(a), 1101(d)(1).

Accord United States v. Schaefer, 87 F.3d at 570; *United States v. Boyce*, 797 F.2d 691, 693 (8th Cir. 1986); *United*

States v. Bolin, 514 F.2d at 557; *Avincola v. Stinson*, 60 F. Supp. 2d 133, 153 (S.D.N.Y. 1999).

In light of *Matlock* and *Raddatz*, there can be no doubt that reliance on hearsay evidence, which would be inadmissible at trial under the rules of evidence, to resolve suppression issues is constitutionally permissible. Such reliance does not necessarily violate a criminal defendant's right to due process.[3]

> d. The trial court's refusal to apply the hearsay rule to exclude consideration of the police report did not violate Jiles's right to due process under the facts of this case.

While, as shown in the preceding section of this brief, reliance on hearsay evidence, which would be inadmissible at trial under the rules of evidence, to resolve suppression issues is constitutionally permissible and does not necessarily violate a criminal defendant's right to due process, the state recognizes that the *Matlock* and *Raddatz* decisions do not necessarily go so far as to create a blanket rule that consideration of hearsay evidence at suppression hearings can *never* be constitutionally objectionable. Those decisions appear to implicitly leave open the possibility that there may be situations in which consideration of hearsay evidence might be constitutionally questionable.

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[3]In his brief, Jiles attempts to distinguish *Matlock* and *Raddatz* on their facts. It is always possible to distinguish cases in that manner. The real question that must be answered is whether the legal principles recognized in those cases, as they have been set forth above by quoting from those cases, cover the case at hand. They clearly do. Jiles has not shown otherwise.

Matlock, however, clearly indicates that this case does not present one of those situations. *Matlock* does so by its analysis of why the trial court in *Matlock* erred in applying the hearsay rule to exclude the hearsay evidence at issue in that case.

The *Matlock* Court took note of two circumstances in concluding that "there was no apparent reason for the judge to distrust the evidence and to exclude [the hearsay declarant's] declarations from his own consideration for whatever they might be worth in resolving, one way or another, the issues raised at the suppression hearings." 415 U.S. at 176. The two circumstances were: first, there was no real question "that the statements had in fact been made"; second, there was "nothing in the record to raise serious doubts about the truthfulness of the statements themselves." 415 U.S. at 175; *accord United States v. Boyce*, 797 F.2d at 693 ("the trial court may accept hearsay evidence at a suppression hearing if the court is satisfied that the statements were made and that there is nothing to raise serious doubt about their truthfulness").

Using those two circumstances as the framework for its analysis, the state does not believe that there is any basis for finding a due process violation here. In the first place, there is absolutely no doubt that the hearsay statements were made. It is the police report itself that constitutes the hearsay. The report set out in writing the hearsay declarations of its maker. Unlike the situation with the oral declarant, where some question could arise whether the purported hearsay declaration was ever made, when the hearsay consists of an officer's written statements, as is the case with the police report at issue, and when the officer's written statements themselves are before the fact-finder, as was the case here, there can be absolutely no question that the statements were made.

Turning to the second circumstance—the lack of serious doubt about the truthfulness of the hearsay statements—the state concedes that Jiles challenged the truthfulness of the officer's statements that constituted the police report through his testimony at the suppression hearing. That testimony, however, was not found credible by the trial court (38:40). Once Jiles's testimony was found not to be credible, there remained nothing in the record to raise any serious question as to the truthfulness of the officer's statements in the police report.

Accordingly, under the circumstances presented here, there is no basis for finding that Jiles's right to due process was violated when the trial court considered the police report in resolving the suppression issue. As in *Matlock*, there was no question that the report was made and no serious question as to its truthfulness once Jiles's testimony contesting its truthfulness was found not to be credible.

e. The decisions on which Jiles relies do not undercut the foregoing.

In arguing that hearsay evidence inadmissible under the rules of evidence may not be relied on at suppression hearings, Jiles relies primarily on two United States Supreme Court decisions: *Jackson v. Denno*, 378 U.S. 368 (1964), and *Townsend v. Sain*, 372 U.S. 293 (1963). Jiles extracts from those decisions the principle that a criminal defendant is entitled to a full and fair evidentiary hearing on a motion to suppress evidence, in particular, a motion to suppress a defendant's statement.

The state agrees with Jiles that *Jackson* and *Townsend*, when read together, establish that principle. But it does not believe that they answer the critical question presented here: whether the full and fair sup-

pression hearings that *Jackson* and *Townsend* require must be conducted in accord with the rules of evidence, in particular, the hearsay rule, so as to require live testimony. *Jackson* and *Townsend* require an "evidentiary hearing" on a motion to suppress a defendant's statement. They do not, however, address the question of whether the rules of evidence must, as a matter of constitutional mandate, apply at such an evidentiary hearing.

In arguing that the *Jackson-Townsend* requirement of an "evidentiary hearing" requires application of the rules of evidence—in particular, the hearsay rule, so as to require live testimony—Jiles makes a fundamental mistake: he implicitly equates an "evidentiary hearing" with a hearing conducted in accord with the rules of evidence. The two are not necessarily the same. An "evidentiary hearing" can be conducted without adherence to the rules of evidence.

That has been explicitly and implicitly recognized in a number of cases. It was explicitly recognized in *State v. Strauss*, 832 P.2d 78 (Wash. 1992). In *Strauss*, the defendant argued that RCW 9.94A.370(2) "requires that the Rules of Evidence apply at sentencing hearings" at which a defendant disputes material facts. That statutory provision provides, in part, as follows: "Where the defendant disputes material facts [for sentencing purposes], the court must either not consider the fact or grant an *evidentiary hearing* on the point." RCW 9.94A.370(2). The defendant in *Strauss* "maintain[ed] that the use of the word 'evidentiary' in this statute indicates a legislative intent that the Rules of Evidence should apply at these sentencing hearings." 832 P.2d at 87.

The *Strauss* court "reject[ed] the defendant's argument." *Id.* It held that "[t]he trial court did not err in determining that the Rules of Evidence do not strictly apply at sentencing hearings held pursuant to RCW

9.94A.370(2)." In doing so, the *Strauss* court plainly and unequivocally rejected the notion that "evidentiary hearing" necessarily means a hearing conducted in accord with the rules of evidence.

Other courts have implicitly recognized that an "evidentiary hearing" can be conducted without adherence to the rules of evidence. Some courts have done so by referring to the inapplicability of the rules of evidence at an "evidentiary hearing." *See, e.g., United States v. Streeter*, 907 F.2d 781, 792 (8th Cir. 1990) ("At the evidentiary hearing, the rules of evidence as such do not apply, ..."); *People v. Gallegos*, 62 Cal. Rptr. 2d 666, 673 (Cal. Ct. App. 1997) ("the same rules of evidence governing jury trials need not govern evidentiary hearings before a judge"). One court has done so by referring, in a heading in its decision, to a hearing to determine the admissibility of evidence, at which the rules of evidence do not apply, as an "Evidentiary Hearing." *State v. Pena-Lora*, 710 A.2d 1262, 1264 (R.I. 1998).

Because, as just shown, an "evidentiary hearing" does not necessarily require adherence to the rules of evidence, the fact that *Jackson* and *Townsend*, when read together, require an "evidentiary hearing" on a motion to suppress a defendant's statement does not answer the critical question presented here: whether the mandated "evidentiary hearing" requires application of the rules of evidence.

That question is directly addressed and answered in the United States Supreme Court's decisions in *Matlock* and *Raddatz*, discussed in the preceding subsections of this brief. As shown there, those two decisions plainly teach that (1) as a general rule, there is no constitutional bar to the consideration of evidence inadmissible under the hearsay rule in resolving suppression motions, and (2) under the circumstances of his case, consideration of the hearsay police report was entirely proper.

If there were any doubt remaining that *Jackson* and *Townsend* cannot be read as excluding consideration of inadmissible hearsay at the "evidentiary hearing" mandated on a motion to suppress a defendant's statement, it would be removed by *Townsend* itself. *Townsend* dealt with the need for an evidentiary hearing in federal habeas corpus proceedings and its mandate in that regard was adopted in *Jackson* as applicable to a hearing held on a motion to suppress a defendant's statement. *See Jackson v. Denno*, 378 U.S. at 392 ("At the very least, *Townsend v. Sain*, 372 U.S. 293, would require a full evidentiary hearing to determine the factual context in which Jackson's confession was given."). Regarding the nature of the "evidentiary hearing" that it required the district court to conduct on remand, the *Townsend* Court said the following:

> On remand it would not, of course, be sufficient for the District Court merely to hear new evidence and to read the state-court record. Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. And questions of credibility, of course, are basic to resolution of conflicts in testimony. *To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in the record*, but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues. This was not done here.

372 U.S. at 322 (emphasis supplied; footnote omitted).

Obviously, the "state-court record" referred to in the foregoing quotation from *Townsend* would be, for the most part if not entirely, hearsay. None of it could be deemed "live testimony," which Jiles contends is essential. Yet the *Townsend* Court plainly stated that the state-court record was "competent evidence" and "either party may choose to rely *solely* upon the evidence contained in [it]" (emphasis supplied). The *Townsend* Court plainly envisioned an "evidentiary hearing" on remand at which one

side's presentation could rest entirely on something other than live testimony.

At the same time, it recognized that a full and fair evidentiary hearing required more. It required that the parties be afforded "the opportunity," but only the opportunity, to present other testimonial or documentary evidence relevant to the disputed issues.

Here, Jiles had precisely the sort of full and fair "evidentiary hearing" that *Jackson* and *Townsend* mandate. He had an "evidentiary hearing," albeit one in which the rules of evidence were declared by the trial court to be inapplicable in resolving whether particular evidence (i.e., the police report at issue) would be received into evidence. Jiles was given a full opportunity to produce whatever evidence he wished, and he took advantage of that opportunity to offer his own testimony into evidence. *Jackson* and *Townsend* do not require any more.

f. Conclusion.

In light of the foregoing, a reasonable attorney could conclude that there was no substantial basis for challenging the trial court's decision to receive into evidence, and to consider, the police report in resolving the issues raised by Jiles's suppression motion. Accordingly, the allegations in Jiles's postconviction motion asserting that failure to object to the trial court's decision constituted ineffective assistance of counsel did not entitle him to a hearing. The motion did not allege facts that, if true, would entitle Jiles to relief and the record conclusively demonstrates, at least with respect to this claimed defect in counsel's performance, that Jiles is not entitled to relief.

2. Prejudice.

Not only did Jiles's postconviction motion fail to make allegations sufficient to require a hearing on deficient performance with respect to trial-court counsel's failure to object, on due process grounds, to the trial court's reliance on the police report, it also failed to make allegations sufficient to require a hearing on the question of prejudice, an essential component of a claim of ineffective assistance of counsel. As indicated in section I-A of this brief, to demonstrate prejudice Jiles must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.*

Jiles's motion fails to make the required showing for two reasons. First, insofar as "the result of the proceeding" is viewed as the result of the suppression hearing at which trial-court counsel is alleged to have performed deficiently, Jiles's motion contains no allegations that would provide any basis for believing that, had trial-court counsel successfully challenged the trial court's reliance on the police report, the result of the suppression hearing would have been different. Had such a successful challenge been mounted, that would have simply required the state to produce the live testimony of the officer who prepared the police report. Had that testimony been produced, there is nothing in the record to suggest that it would have changed the result.

Quite the contrary, live testimony from the police officer would most likely have reinforced the result. Jiles has not provided any reason to believe that the officer who prepared the police report would not have testified in a manner fully consistent with his report. Such testimony

would have provided the trial court with an additional reason to refuse to credit Jiles's testimony: that testimony would have been in conflict with the sworn testimony of a police officer.

In other words, even in the absence of any testimony from the officer who prepared the police report, the trial court refused to credit Jiles's testimony, apparently based on its inherent implausibility[4] and/or Jiles's demeanor in giving it. Testimony from the officer would, as best one can discern from the record as it presently exists, have only cast even greater doubt on the credibility of Jiles's testimony.

In short, the allegations in Jiles's postconviction motion provide no basis for concluding that there is a reasonable probability that, had trial-court counsel successfully challenged the trial court's reliance on the police report, which would have required the state to produce the live testimony of the officer preparing that report, the result of the suppression hearing would have been different.

There is a second flaw in Jiles's postconviction motion insofar as the question of prejudice is concerned. In *State v. Bentley*, 201 Wis. 2d at 312, this court indicated that, when a criminal defendant who has pleaded guilty raises a claim of ineffective assistance of counsel in order to obtain withdrawal of his plea, as Jiles is attempting to do, and seeks a hearing on that claim, he or she "must allege facts to show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded

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[4]Among other reasons why the trial court could have found Jiles's testimony inherently implausible is the fact that, while he admitted signing his name to the police report at issue, he denied affixing his initials to it in the places where his initials appeared (38:27-29).

guilty and would have insisted on going to trial.'" In other words, he or she must "allege that he [or she] would have pled differently" and must support that allegation "by objective factual assertions." 201 Wis. 2d at 313. If a defendant fails to satisfy that requirement, he or she is not entitled to a hearing on his or her claim of ineffective assistance of counsel. 201 Wis. 2d at 318.

In *State v. Jackson*, 229 Wis. 2d 328, 340-45, 600 N.W.2d 39 (Ct. App. 1999), the Wisconsin Court of Appeals applied that requirement in the context of a defendant complaining about his trial counsel's failure to seek to suppress his (the defendant's) statement. The court of appeals thus indicated that the requirement is applicable in the present context, where Jiles is complaining about ineffectiveness relating to the motion to suppress his statement.

In his postconviction motion, Jiles did not even allege, much less support by factual assertions, that, had trial-court counsel successfully prosecuted the suppression motion, he would not have pleaded guilty. Jiles has fallen far short of making the sort of allegations regarding prejudice that *Bentley* and *Jackson* require to warrant an evidentiary hearing on a claim of ineffective assistance of counsel made after conviction based on a guilty plea.

C. Jiles's claim that his trial-court counsel failed to properly object, on grounds of lack of authentication, to the trial court's receipt of the police report at his suppression hearing.

1. Deficient performance.

Jiles's second complaint about his trial counsel's performance is that counsel "was prejudicially ineffective for failing to object to the trial court's consideration of the

police report[] at the Motion hearing" on the ground that "[t]he police report had not been properly authenticated" (Jiles's brief at 20; underlining deleted). The allegations in Jiles's postconviction motion regarding this alleged defect in counsel's performance do not merit a hearing because any objection to the police report at issue on the basis of lack of authentication would have been patently meritless.

In the first place, as shown in section I-B-1-b of this brief, the rules of evidence did not apply at the suppression hearing in this case. The requirement of authentication is a rule of evidence codified in Wis. Stat. § 909.01. Consequently, it did not apply at the suppression hearing, so any objection to the police report based on lack of compliance with this requirement would have been meritless.

Secondly, and perhaps more importantly, the requirement of authentication was plainly met in this case. As § 909.01 states, all that is necessary to satisfy the requirement of authentication is evidence "sufficient to support a finding that the matter in question is what its proponent claims." That does not set a particularly high hurdle to clear before evidence may be admitted. And, in the case of documents, it does not necessarily require extrinsic evidence or testimony to satisfy it.

That is clear from Wis. Stat. § 909.015, which sets forth "examples of authentication or identification conforming with the requirements of s. 909.01." Among the examples given is the following:

> (4) DISTINCTIVE CHARACTERISTICS AND THE LIKE. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

Wis. Stat. § 909.015(4).

Thus, with respect to documents such as the police report at issue in this case, authentication can be found in the document's internal "[a]ppearance, contents, substance, . . . or other distinctive characteristics, taken in conjunction with circumstances." Here, the police report, which is found at pages 12:7-9 of the record, plainly has the appearance, contents, and substance of a police report. In that regard, the state does not intend to set forth here each of the facets and features of the document found at pages 12:7-9 of the record that indicates that it is a police report. It suffices to simply ask this court to examine the document. Such examination will certainly convince this court that it has the appearance, contents, and substance of a police report.

Insofar as other "circumstances" are concerned, it should be noted that the document at issue was attached, along with the police report concerning the statements made to the police by Lyron Wilson (Jiles's co-actor), to Jiles's motion to sever his trial from that of his co-actor. In the motion, Jiles asserted the following regarding the two documents:

> Wilson made a statement to Milwaukee Police Department officers, wherein he stated that he told Jiles that he, Wilson, was going to rob the lady, and that Jiles knew that he, Wilson, had the gun. A copy of said statement, as provided to the defense in discovery materials, is attached to this memorandum.
>
> Jiles also made a statement to Milwaukee Police Department officers. He stated that he did not know that Wilson had a gun. A copy of that statement, as provided in discovery materials, is attached to this memorandum as well.

(12:1-2.)

The appearance, contents, and substance of the document in question, combined with Jiles's identification of it, in his motion to sever, as a police report containing the

statement he gave to the police, should be more than sufficient to satisfy the authentication requirement. But there is more. Although, as stated above, the authentication rule does not appear to require testimony to authenticate a document—i.e., to provide evidence that a document is what its proponent claims it to be—here there was such testimony. It came from Jiles's own mouth.

During the course of his testimony at the suppression hearing, Jiles was asked the following questions about the document at issue and gave the following answers:

On direct examination:

Q I'm going to show you three pages here of writing [the police report in question]. And have you ever seen this before?

A Yes.

Q When did you see it?

A The same night he was asking me questions.

Q All right. I'm going to show you on page two there what looks like a signature, Joseph Jiles. Is that your signature?

A Yes.

. . . .

Q I'm going to show you page three of that document. There's a star or X here and another signature, Joseph Jiles. Is that your signature?

A Yes.

(38:20-21.)

On cross-examination:

Q This is your signature on about the fourth line of the page, isn't it?

A Yes.

Q How do you know that's your signature?

A Because that's where he had me sign it.

Q Is that the way you write your name?

A Yes.

Q If you wrote your name right now, you'd write it just like that?

A Probably so.

. . . .

Q Okay. And at the end there whose signature is that?

A Mine.

(38:28-29.)

That testimony unequivocally authenticated the document as the police report that was prepared by the officer at the time he interviewed Jiles. No one could seriously suggest otherwise.[5]

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[5]Rather than argue that his testimony did not authenticate the police report, Jiles argues that this court cannot properly rely on his testimony to find that the report was authenticated because the trial court received and considered the report as satisfying the state's burden of proof *before* he took the stand and gave his testimony (Jiles's brief at 22). To that argument, the state has two responses.

First, Jiles has never suggested that, at the outset of the suppression hearing, he did not intend to take the stand to establish his case for suppressing his statements. Thus, it is fair to assume that, at the time the police report in question was received into evidence by the trial court, Jiles's trial-court counsel knew that eventually Jiles would be taking the stand and admitting that the police report was what it purported to be, as he did. Knowing that, Jiles's trial-court counsel could reasonably have concluded that an objection to the police report at the time it was received, based on lack of authentication, would have served no useful purpose. Thus,

In light of the foregoing, an objection to the police report in question based on a claim that the authentication requirement of § 909.01 was not met would have been patently fatuous. Accordingly, trial-court counsel's failure to make such an objection cannot be labeled deficient performance.

2. Prejudice.

As indicated above in section I-B-2 of this brief, there are two different perspectives from which to view the question of prejudice—i.e., the question whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. The first is to view the "proceeding" as the suppression hearing at which the alleged deficient performance occurred and the "result" as the denial of Jiles's suppression motion. The second is to view the "proceeding" as the entire criminal prosecution of Jiles and the "result" as his conviction. As will be seen, from either perspective Jiles's postconviction motion fails to make a showing of prejudice sufficient to require a hearing on it.

Insofar as "the result of the proceeding" is viewed as the result of the suppression hearing at which trial-court counsel is alleged to have performed deficiently, Jiles's motion contains no allegations that would provide any

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Jiles's testimony can properly be considered in determining whether his trial-court counsel's performance was deficient.

Second, as already indicated above in the body of this brief, Jiles's testimony is simply frosting on the cake. The appearance, contents, and substance of the document in question, combined with Jiles's identification of it, in his motion to sever, as a police report containing the statement he gave to the police, is in itself more than sufficient to satisfy the authentication requirement.

basis for believing that, had trial-court counsel objected on grounds of lack of authentication and had there been any merit to such objection (there clearly would not have been, as shown in the preceding section of this brief), the result of the suppression hearing would have been different. Such an objection would simply have required the state to produce the required authentication (e.g., by adducing the testimony of the police officer who prepared the report in question). Jiles has never asserted, much less shown, that the state could not have done so. Nor has he ever asserted that the document in question was not in fact the police report that it purported to be. Under the circumstances, it is impossible to discern any possible prejudice in trial-court counsel's failure to raise the authentication issue. There is no reasonable probability that, had the authentication issue been raised, the outcome of the suppression hearing would have been different.

Insofar as "the result of the proceeding" is viewed as the result of this criminal prosecution, i.e., Jiles's conviction based on his guilty pleas, Jiles has never alleged, much less asserted facts demonstrating, that he would not have pleaded guilty had trial-court counsel been successful in obtaining the suppression of his statement. As shown in section I-B-2 of this brief, such an allegation, supported by objective factual assertions, is essential if a defendant is to obtain a hearing on the question of prejudice when his or her conviction has resulted from his or her guilty plea. Because Jiles has failed to satisfy that requirement, he is not entitled to a hearing on his claim that his trial-court counsel performed deficiently in failing to object to the police report on the ground that it was not adequately authenticated.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE STATE MET ITS BURDEN OF PROOF AT THE SUPPRESSION HEARING.

In addition to his ineffective-assistance-of-counsel claim, Jiles presents a second issue on this review of the court of appeals' decision. He argues that

> the court of appeals erred in determining that the state's evidence met the requisite burden of proof. The lack of live testimony and unauthenticated reports failed to satisfy such burden.

(Jiles's brief at 29; capitalization and underlining deleted.) The state has two responses to that argument.

First, Jiles's entire argument on the second issue he raises is contained in one paragraph that begins with this sentence: "*For all of the reasons indicated*, the State failed to meet its burden of proof at the Miranda-Goodchild hearing" (Jiles's brief at 29; emphasis supplied). Jiles's argument thus appears to be built on the foundation of the arguments he makes earlier in his brief regarding the trial court's receipt of the police report into evidence and its reliance on that report in making its decision. In part I of this brief, the state has shown those arguments to be without merit. Accordingly, the foundation for this one crumbles.

In this regard, the court of appeals was right on the mark when it disposed of the argument presently being addressed by stating:

> Second, Jiles alleges that the trial court erred when it denied his motion to suppress because, "[f]or all of the reasons indicated, the State failed to meet its burden of proof at the Miranda-Goodchild hearing." This argument is simply a rehash of Jiles's prior allegations—it adds nothing to the arguments that we have already rejected. Accordingly, we decline to further address it. *See* ***State v. Echols***, 152 Wis. 2d 725, 745, 449 N.W.2d 320, 327 (Ct.

> App. 1989) ("[l]arding a final catch-all plea for reversal with arguments that have already been rejected adds nothing; 'zero plus zero equals zero'") (quoted source omitted).

Slip op. at ¶18.

Second, Jiles's argument appears to offer two reasons why the court of appeals erred when it concluded that the state met its burden of proof at the suppression hearing by relying on the police report containing the statement he sought to suppress and describing the circumstances surrounding its making: (1) live testimony from the officer who prepared the report was necessary to prove its assertions; (2) the report was not authenticated.

Taking the second reason first, it is plainly without substance. As shown in section I-C-1 of this brief, the report's appearance, contents, and substance, combined with Jiles's attachment of it to his motion to sever, in which he identified it as containing the statement he made to the police, amply authenticated it. And, if that is not enough to permit this court to conclude that the report was sufficiently authenticated, Jiles's own testimony at the suppression hearing, identifying it as the statement he signed at his interview with the police, unquestionably proved that the report was what it purported to be.

Turning to the trial court's reliance on the police report, without requiring live testimony establishing the facts asserted in it, there is no reason to believe such reliance was improper. Assuming that the report, which was concededly hearsay, *was admissible* because the hearsay rule, like the rules of evidence generally, is not applicable at suppression hearings, as the state has argued in section I-B-1-b of this brief, the state knows of no reason why it could not be relied upon by the trial court as proof of the facts contained therein. The notion that

reliance on properly admitted evidence to establish facts is somehow improper is a strange one indeed.

And, even if the report *was not admissible*, reliance on it would still have been proper. As indicated at the outset of this brief, Jiles never objected to consideration of the police report at the suppression hearing. Thus, as also pointed out at the outset of this brief, it could properly be relied on by the trial court to establish the facts asserted in it, even if it was inadmissible hearsay:

> Hearsay evidence, although it may be objected to, is nevertheless probative; and if it is admitted without objection, the judge and jury have the right to rely on it.

Caccitolo v. State, 69 Wis. 2d at 113; *accord State v. Heredia*, 172 Wis. 2d at 482 n.1 ("Unobjected-to hearsay is, of course, admissible for its truth."); *State v. Jenkins*, 168 Wis. 2d at 203 ("Unobjected-to-hearsay is admissible as substantive evidence.").

CONCLUSION

Based on the foregoing, the state requests this court to affirm the decision of the court of appeals upholding the judgment and order from which this appeal has been taken.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,016 words.

David J. Becker

STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 02-0153-CR

STATE OF WISCONSIN,

Plaintiff-Respondent

vs.

JOSEPH JILES,

Defendant-Appellant-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE ROBERT CRAWFORD, PRESIDING

REPLY BRIEF OF APPELLANT-PETITIONER

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ARGUMENT

THE RESPONDENT MISREPRESENTS THE LAW APPLICABLE TO THE CONDUCTING OF CONFESSION SUPPRESSION HEARINGS.

A. The U.S. Supreme Court, as indicated in Appellant-Petitioner's Brief, has clearly stated that live testimony is necessary in order to support Any finding that the Confession should be suppressed. Such testimony is a Due Process Requirement.

The Respondent's discussion of the two precedential U.S. Supreme Court cases pertaining to the conducting of a confession hearing is much too ineffectual and improper. The Respondent's

Brief only discusses these two guiding cases on pages 19-20 of its Brief. This discussion lasts only for these three paragraphs. However, this is too far minimal of an analysis of the governing case law pertaining to such hearings.

These two U.S. Supreme Court cases that govern confession suppression hearings, as shown in Appellant-Petitioner's Brief, clearly mandate that a full and fair evidentiary hearing for such hearings requires live testimony. This is in order to sort out credibility questions with questions of fact frequently in dispute. Jackson vs. Denno, 84 S.Ct. 1774 at 1781 (1964); Townsend vs. Sain, 83 S.Ct. 745 at 762 (1963). Accordingly, the failure to have such live testimony dooms the suppression hearing in this present case. The State's Brief does not even mention, much less acknowledge, this crucial holding of these two cases.

The Respondent's Brief merely indicates that Jackson vs. Denno and Townsend vs. Sain hold that a criminal defendant is entitled to a full and fair evidentiary hearing in such cases as is present here. Although this is true, these cases hold that a full and fair evidentiary hearing requires live testimony. Whether the Rules of Evidence apply is not completely the issue. The Respondent confuses this point. The requirement of live testimony is not exclusive of the Rules of Evidence. Hence, the Respondent's discussion is erroneous and ineffective.

The Respondent seems to pay reliance that simply because Jiles himself was able to provide evidence, to include testimony, the requirements of a full and fair hearing were met. However, as

the trial court indicated at the suppression hearing itself, the State has the burden of proof at these hearings. (38:8). The Defendant is not required to provide any evidence. He could simply have rested after the State's case. Whether or not a Defendant takes the stand is discretionary. State ex rel. Goodchild vs. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965). Furthermore, a Defendant is not required to decide whether or not to testify until after the trial court has determined that the State has met its burden of proof. In this case, the trial court indicated that the State had met its burden of proof without having received any live testimony. Unfortunately, under such a circumstances, the questions of credibility are not sorted out through such tried and true methods such as cross-examination. The credibility of the State's evidence is always a factor in deciding whether or not the State has met its burden of proof. Clearly, the present situation does not meet the requirements of the two U.S. Supreme Court cases indicated above. This is a defect in the State's logic.

Based upon the foregoing, the Respondent also errs in indicating that the mere submission of a police report, without supporting live testimony to assess credibility, meets the due process requirements of a full and fair hearing. Once again, as the U.S. Supreme Court has indicated, with respect to Fifth Amendment suppression hearings, that this is insufficient. Live testimony is required. Clearly, the police report itself is not the basis for the decision. The police officer that wrote the

report, and the accompanying testimonial credibility or lack thereof, is the basis. Accordingly, any arguments that the police report is admissible hearsay are irrelevant and immaterial. By itself, an admitted report is insufficient.

The Respondent errs in stating that evidentiary hearings do not always require live testimony. This is not a sentencing hearing, as was in State vs. Strauss, 832 P.2d 78 (Wash. 1992). As indicated, the U.S. Supreme Court has established that live testimony is necessary in order for the State to meet its burden of proof at Fifth Amendment Suppression hearings. The present situation is unique and has its own rules. Accordingly, the State errs by grouping Fifth Amendment Suppression hearings with any other hearing.

The Respondent's Brief implies that police officers never lie or make mistakes. This is a crucial flaw. Such a conclusion is not a matter of law. Law enforcement officers have been known to fabricate the truth. Furthermore, they are not experts on the law. A trial court cannot simply conclude without live testimony, and its cross-examination, that a police officer's statement to the effect that "no threats or promises were made," meets the legal requirements of voluntariness. Police officers may honestly believe that they did not make such threats or promises. However, under cross-examination, such an honest belief might be a mistaken belief to the point that the trial court might disagree. Accordingly, the Respondent's blanket conclusion that police officers never lie, and their beliefs are beyond reproach, is

erroneous.

Also, based upon the foregoing, the Respondent also errs in concluding that the Appellant has not shown that the result would have been different had the police officer testified. Once again, this is not the Defendant's responsibility. The trial court had not properly conducted the evidentiary hearing with respect to the introduction of evidence during the State's case in chief. The hearing did not meet Due Process requirements, as laid out in the above-cited U.S. Supreme Court case law. One does not need to know how the police officer would have testified. The failure of this officer to testify, by itself, was materially defective.

The Defendant does not need to show how the police officer would have testified because: (1) the hearing did not meet constitutional Due Process requirements with respect to the presentation of live testimony in the State's case; and (2) because the hearing did not meet such requirements due to an incomplete and impermissible presentation of the State's case, the State did not meet its burden of proof. It is the State's responsibility to prove lack of voluntariness and compliance with Miranda warnings. (38:8). As the U.S. Supreme Court has indicated, this must be met with live testimony. Accordingly, one does not need to speculate as to what how police officer would have testified because the hearing itself violated the U.S. Supreme Court's decisions.

Therefore, for the reasons indicated, the lack of a proper suppression hearing both satisfies the prejudice requirement of

ineffective assistance of counsel as well as shows that the State failed to meet its burden of proof.

B. Contrary to the Respondent's Brief, the lack of authentication of the police report was crucial in determining its admissibility.

The Respondent errs in indicating either that the police report is a self-authenticating document, or that its authentication was not necessary.

As indicated in the Appellant-Petitioner's Brief, and contrary to the Respondent's Brief, authentication of a document is not a question of the application of a technical rule of evidence. It goes to genuineness and relevance. Judicial Council Committee Notes (1974) to Wis. Stats. 909.01, citing "McCormick's on Evidence", section 194. Therefore, the State is erroneous in indicating that this police report did not need authentication.

Furthermore, the police report was not so distinctive as to not need authentication, as part of the State' burden of proof. The Respondent's own case law that it provided to the Court of Appeals, State vs. Mitchell and State vs. Gilles, analyzed police reports as being a business records exception to the hearsay rule, pursuant to Wis. Stats. 908.03(6). State vs. Mitchell, 84 Wis.2d 325, 267 N.W.2d 349 (1978); State vs Gilles, 173 Wis.2d 101, 496 N.W.2d 133 (Ct.App. 1992). However, this statutory provision itself requires that admissibility of such records require the testimony of a custodian or other qualified witness. Wis. Stats. 908.03(6).

State vs. Mitchell and State vs. Gilles are the only case law that the Respondent has ever provided pertaining to the admissibility of police reports. Those cases cite a Rule of Evidence that requires live testimony before admission can occur. Such testimony did not occur.

Furthermore, the Respondent has not provided any case law to support it proposition that such police reports are "distinctive" so as to become self-authenticating. On the contrary, the cited cases stand for the proposition that a live person, such as a custodian or other qualified witness, must testify prior to their admissibility. Accordingly, these cases work against the admissibility of the police report at the suppression hearing in question. Therefore, the State's argument that such police reports are self-authenticating and distinctive is improper.

The Respondent errs in indicating that the Defendant's own testimony forms the basis for the admissibility of the State's police report. Clearly, this is putting the cart before the horse. The above-cited case law and Rules of Evidence state that prior to admissibility, an adequate foundation must be laid with respect to authentication and foundation. Here, the trial court admitted the police reports (38:8-12) prior to the Defendant's testimony (38:13-32). The Respondent's argument is improper "bootstrapping."

The Respondent indicates that Defendant never indicated at the outset of the hearing that he would not take the stand. (Respondent's Brief, page 30, footnote 5). However, as clearly

indicated throughout this Brief and Appellant-Petitioner's original Brief, Defendants are not required to testify at such hearings. This is beyond dispute. At the conclusion of the State's presentation, the Defendant may take the stand. This is discretionary. On numerous occasions, Defendants take the stand merely to rebut the State's evidence. Defendants are not required to announce, prior to the hearing, their intentions with respect to testifying. Accordingly, this argument is erroneous and improper.

CONCLUSION

As indicated within this Reply Brief and within Appellant-Petitioner's original Brief, the trial court erroneously and improperly denied Appellant's Motion for a Machner hearing. The Court of Appeals improperly and erroneously affirmed this Decision. Trial counsel was prejudicially ineffective for failing to object to the trial court's improperly conducted Suppression Motion hearing. This Suppression Motion hearing did not meet the Due Process standards for such a hearing, as cited by the U.S. Supreme Court.

Also, the trial court erred in stating that the State had met its burden of proof at the Suppression Motion hearing. Once again, the Court of Appeals erroneously and improperly affirmed this Decision. The hearing did not comply with the Due Process requirements established to ensure that States meet their burden

of proof, as cited by the U.S. Supreme Court. Accordingly, the State's evidence at the Suppression hearing was constitutionally incomplete. It failed to meet a constitutional standard of the burden of proof.

Based upon the foregoing as well as the reasons outlined in his original Brief, the Appellant-Petitioner respectfully requests that this Court reverse the Decision of the Court of Appeals as well as the Decision and Order of the Trial Court.

Dated this 10th day of April, 2003.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that the Reply Brief of Defendant-Appellant-Petitioner in the matter of State of Wisconsin vs. Joseph Jiles, 02-0153-CR conforms to the rules contained in Wis. Stats. 809.19 (8)(b)(c) for a Brief with a monospaced font and that the length of the Brief is nine (9) pages.

Dated this 10th day of April, 2003, in Waukesha, Wisconsin.

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